No. 14-770

Title:	Bank Markazi, aka The Central Bank of Iran, Petitioner v. Deborah Peterson, et al.
Docketed:	December 31, 2014
Lower Ct:	United States Court of Appeals for the Second Circuit
Case Nos.:	(13-2952)
Decision Date:	July 9, 2014
Rehearing Denied:	September 29, 2014

Questions Presented

—Date—	------Proceedings and Orders----------
Dec 29 2014	Petition for a writ of certiorari filed. (Response due January 30, 2015)
Jan 23 2015	Order extending time to file response to petition to and including March 2, 2015.
Mar 2 2015	Brief of respondents Deborah Peterson, et al. in opposition filed.
Mar 17 2015	Reply of petitioner Bank Markazi, aka The Central Bank of Iran filed.
Mar 18 2015	DISTRIBUTED for Conference of April 3, 2015.
Apr 6 2015	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Aug 19 2015	Brief amicus curiae of United States filed.
Sep 1 2015	Supplemental brief of petitioner Bank Markazi, aka The Central Bank of Iran filed.
Sep 2 2015	DISTRIBUTED for Conference of September 28, 2015.
Oct 1 2015	Petition GRANTED.
Nov 6 2015	Motion to dispense with printing the joint appendix filed by petitioner Bank Markazi, aka The Central Bank of Iran.
Nov 16 2015	Brief of petitioner Bank Markazi, aka The Central Bank of Iran filed.
Nov 20 2015	Consent to the filing of amicus curiae briefs, In support of either party or of neither party received from counsel for the petitioner
Nov 20 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party received from counsel for the respondents, Deborah Peterson, et al.
Nov 23 2015	Brief amici curiae of Federal Courts Scholars filed.
Nov 24 2015	SET FOR ARGUMENT on Wednesday, January 13, 2016
Nov 30 2015	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Dec 4 2015	Record requested from U.S.C.A. 2nd Circuit.
Dec 11 2015	Record received from U.S.D.C. Southern District of New York. The record is SEALED, and arrived in 4 Boxes.
Dec 15 2015	CIRCULATED.
Dec 16 2015	Brief of respondents Deborah Peterson, et al. filed. (Distributed)
Dec 17 2015	Record received from U.S.C.A. 2nd Circuit. The record is electronic, also received is one box of SEALED records.

Dec 21 2015	Brief amici curiae of National Security Law Professors filed. (Distributed)
Dec 22 2015	Brief amicus curiae of The United States Senate filed. (Distributed)
Dec 22 2015	Brief amicus curiae of Agudas Chasidei Chabad filed. (Distributed)
Dec 23 2015	Brief amicus curiae of United States filed. (Distributed)
Dec 23 2015	Brief amici curiae of Former Senior Officials of the Office of Legal Counsel filed. (Distributed)
Dec 23 2015	Brief amici curiae of The Bipartisan Legal Advisory Group of the U.S. House of Representatives, and 225 Individual Members of the U.S. House of Representatives filed. (Distributed)
Dec 23 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Dec 23 2015	Brief amicus curiae of Foundation for Defense of Democracies filed. (Distributed)
Dec 23 2015	Brief amici curiae of Constitutional Law and Federal Courts Scholars filed. (Distributed)
Dec 23 2015	Brief amici curiae of Current United States Senators Sheldon Whitehouse, Lindsey O. Graham, Ted Cruz, and Christopher A. Coons filed. (Distributed).
Jan 6 2016	Reply of petitioner Bank Markazi, aka The Central Bank of Iran filed. (Distributed)
Jan 8 2016	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jan 13 2016	Argued. For petitioner: Jeffrey A. Lamken, Washington, D. C. For respondents: Theodore B. Olson, Washington, D. C.; and Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae).
Apr 20 2016	Adjudged to be AFFIRMED. Ginsburg, J., delivered the opinion of the Court, in which Kennedy, Breyer, Alito, and Kagan, JJ., joined, and in all but Part II-C of which Thomas, J., joined. Roberts, C. J., filed a dissenting opinion, in which Sotomayor, J., joined.
May 23 2016	JUDGMENT ISSUED

No. 14-770

Supreme Court, U.S.
FILED
DEC 29 2014
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IN THE

Supreme Court of the United States

BANK MARKAZI,
THE CENTRAL BANK OF IRAN,
Petitioner,

v.

DEBORAH D. PETERSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case concerns nearly $2 billion of bonds in which Bank Markazi, the Central Bank of Iran, held an interest in Europe as part of its foreign currency reserves. Plaintiffs, who hold default judgments against Iran, tried to seize the assets. While the case was pending, Congress enacted §502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. §8772. By its terms, that statute applies only to this one case: to "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." *Id.* §8772(b). "In order to ensure that Iran is held accountable for paying the judgments," it provides that, notwithstanding any other state or federal law, the assets "shall be subject to execution" upon only two findings—essentially, that Bank Markazi has a beneficial interest in them and that no one else does. *Id.* §8772(a)(1), (2). The question presented is:

Whether §8772—a statute that effectively directs a particular result in a single pending case—violates the separation of powers.

PARTIES TO THE PROCEEDINGS BELOW

Due to its length, the list of parties to the proceedings below is set forth in full in the appendix (App., *infra*, 130a-144a).

TABLE OF CONTENTS

	Page
Opinions Below	1
Statement of Jurisdiction	1
Constitutional, Statutory, and Treaty Provisions Involved	2
Preliminary Statement	2
Statement	3
I. Statutory Framework	3
A. The Foreign Sovereign Immunities Act	3
B. The Terrorism Amendments to the FSIA	4
C. Article 8 of the Uniform Commercial Code	5
II. Proceedings Below	7
A. Proceedings Before the District Court	7
1. The Restraints and Blocking Order	7
2. Congress's Enactment of § 8772	9
3. The District Court's Decision	11
B. The Court of Appeals' Opinion	12
Reasons for Granting the Petition	14
I. This Case Presents Important Separation-of-Powers Questions Left Open in *Robertson*	15
A. *Klein* Prohibits Congress from Dictating the Outcome of a Particular Case	15
B. *Klein*'s Scope Remains Uncertain	18

TABLE OF CONTENTS—Continued

	Page
C. This Case Squarely Presents Important Issues Left Open in *Robertson*	19
II. The Constitutional Issues Are Important and Recurring	22
A. The Question Presented Raises Fundamental Separation-of-Powers Issues	22
B. Congress Has Repeatedly Disregarded Separation-of-Powers Principles in This Context	23
III. This Case Has Important International Ramifications	25
A. The Decision Below Puts the United States in Violation of Its Treaty Obligations	25
B. The Decision Below Undermines the President's Authority over Foreign Affairs	27
C. The Decision Undermines Confidence in U.S. Financial Markets	29
D. The Decision Invites Retaliation by Foreign Governments	30
IV This Case Is an Excellent Vehicle	31
Conclusion	33
Appendix A – Opinion of the Court of Appeals (July 9, 2014)	1a
Appendix B – Order of the District Court Entering Partial Final Judgment (July 9, 2013)	13a

TABLE OF CONTENTS—Continued

Page

Appendix C – Order of the District Court Denying Reconsideration (May 20, 2013) 31a

Appendix D – Opinion and Order of the District Court (Feb. 28, 2013) 52a

Appendix E – Order of the District Court (June 23, 2009) 125a

Appendix F – Order of the Court of Appeals Denying Rehearing (Sept. 29, 2014) 128a

Appendix G – Order of the Court of Appeals Staying the Mandate (Oct. 29, 2014) 129a

Appendix H – Parties to the Proceedings Below 130a

Appendix I – Relevant Constitutional, Statutory, and Treaty Provisions 145a

TABLE OF AUTHORITIES

Page(s)

CASES

Bank Melli Iran N.Y. Representative Office v. *Weinstein*, 131 S. Ct. 3012 (2011) 31

Benjamin v. *Jacobson*, 124 F.3d 162 (2d Cir. 1997), vacated, 172 F.3d 144 (2d Cir. 1999), cert. denied, 528 U.S. 824 (1999) 18

Biodiversity Assocs. v. *Cables*, 357 F.3d 1152 (10th Cir. 2004), cert. denied, 543 U.S. 817 (2004) 18, 32

Bond v. *United States*, 131 S. Ct. 2355 (2011) 23

CFTC v. *Schor*, 478 U.S. 833 (1986) 23

Cheney v. *U.S. Dist. Court*, 542 U.S. 367 (2004) 23

Christopher v. *Harbury*, 536 U.S. 403 (2002) 31

The Clinton Bridge, 77 U.S. 454 (1870) 32

Dames & Moore v. *Regan*, 453 U.S. 654 (1981) 28

First Nat'l City Bank v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) 5, 26

Free Enter. Fund v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) 23

Freytag v. *Comm'r*, 501 U.S. 868 (1991) 23

Heiser v. *Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013) 5

TABLE OF AUTHORITIES—Continued

Page(s)

In re Islamic Republic of Iran Terrorism Litig., 659 F Supp. 2d 31 (D.D.C. 2009) 25

Janko v. *Gates*, 741 F.3d 136 (D.C. Cir. 2014), petition for cert. filed, No. 14-650 (Nov. 26, 2014) 18

JPMorgan Chase Bank v. *Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88 (2002) 31

Kumar v. *Republic of Sudan*, No. 2:10cv171, 2011 WL 4369122 (E.D. Va. Sept. 19, 2011), rev'd on other grounds *sub nom. Clodfelter* v. *Republic of Sudan*, 720 F.3d 199 (4th Cir. 2013) 25

Lindh v. *Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), rev'd on other grounds, 521 U.S. 320 (1997) 18, 21, 32

Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. *Elahi*, 552 U.S. 1176 (2008) 31

Nat'l Coal. To Save Our Mall v. *Norton*, 269 F.3d 1092 (D.C. Cir. 2001), cert. denied, 537 U.S. 813 (2002) 18, 19

NML Capital, Ltd. v. *Banco Central de la República Argentina*, 652 F.3d 172 (2d Cir. 2011), cert. denied, 133 S. Ct. 23 (2012) 29

Oil Platforms (Iran v. *U.S.)*, 2003 I.C.J. 161 (Nov. 6) 27

Pennsylvania v. *Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1856) 16

TABLE OF AUTHORITIES—Continued

Page(s)

Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) 23, 24

Robertson v. *Seattle Audubon Soc'y*, 503 U.S. 429 (1992) ..... *passim*

Roeder v. *Islamic Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003), cert. denied, 542 U.S. 915 (2004) 24

Rubin v. *Islamic Republic of Iran*, 132 S. Ct. 1619 (2012) 31

Stern v. *Marshall*, 131 S. Ct. 2594 (2011) 23

Sumitomo Shoji Am., Inc. v. *Avagliano*, 457 U.S. 176 (1982) 27

United States v. *Klein*, 80 U.S. 128 (1872) .... *passim*

United States v. *Padelford*, 76 U.S. 531 (1870) 16

Verlinden B.V. v. *Cent. Bank of Nigeria*, 461 U.S. 480 (1983) 3

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. art. III ..... *passim*

Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1602 *et seq.*) ..... *passim*

28 U.S.C. § 1603(a) 3

28 U.S.C. § 1604 3

28 U.S.C. § 1605 3

28 U.S.C. § 1605A 5, 24

28 U.S.C. § 1605A(a)(1) 4

28 U.S.C. § 1605A(a)(2)(A)(i)(I) 4

TABLE OF AUTHORITIES—Continued

Page(s)

28 U.S.C. § 1605A(a)(2)(B) 24
28 U.S.C. § 1609 3
28 U.S.C. § 1610(a) 4
28 U.S.C. § 1610(a)(7) 4
28 U.S.C. § 1610(b) 4
28 U.S.C. § 1610(b)(3) 5
28 U.S.C. § 1610(g) 5
28 U.S.C. § 1611(b) 4, 9, 29
28 U.S.C. § 1611(b)(1) 4

Pub. L. No. 101-121, 103 Stat. 701 (1989):
§ 318(b)(3), 103 Stat. at 746 17
§ 318(b)(5), 103 Stat. at 746-747 17
§ 318(b)(6)(A), 103 Stat. at 747 17

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241 4

Pub. L. No. 107-77, § 626(c), 115 Stat. 748, 803 (2001) 24

Pub. L. No. 107-117, § 208, 115 Stat. 2230, 2299 (2002) 24

Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337 ..... *passim*
28 U.S.C. § 1610 note § 201(a) 5

National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338 5
§ 1083(c)(2), 122 Stat. at 342 24

TABLE OF AUTHORITIES—Continued

Page(s)

Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502, 126 Stat. 1214, 1258 (codified at 22 U.S.C. § 8772) ..... *passim*
22 U.S.C. § 8772(a)(1) 2, 11
22 U.S.C. § 8772(a)(1)(C) 26, 30
22 U.S.C. § 8772(a)(2) ..... *passim*
22 U.S.C. § 8772(a)(2)(A) 20
22 U.S.C. § 8772(b) ..... *passim*
22 U.S.C. § 8772(c)(1) 10, 19, 22

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2403(a) 1

Ch. 120, 12 Stat. 820 (1863):
§ 1, 12 Stat. at 820 16
§ 3, 12 Stat. at 820 16

Ch. 251, 16 Stat. 230 (1870) 16

Fed. R. Civ. P. 54(b) 12

Uniform Commercial Code ..... *passim*
U.C.C. art. 8 prefatory note (1994) 6
U.C.C. § 8-112(c) 6, 8
U.C.C. § 8-112 cmt. 3 7
U.C.C. § 8-504(a) 6
U.C.C. §§ 8-505 to 8-508 6

TREATY PROVISIONS

Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899 ..... *passim*
Art. III.1, 8 U.S.T. at 902 26
Art. IV.1, 8 U.S.T. at 903 ..... 25, 26
Art. XXI.2, 8 U.S.T. at 913 27

TABLE OF AUTHORITIES—Continued

Page(s)

United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, art. 21(1)(c), U.N. Doc. A/RES/59/38 (Dec. 2, 2004) 29

LEGISLATIVE MATERIALS

H.R. Rep. No. 94-1487 (1976) 29, 30

158 Cong. Rec. H5569 (Aug. 1, 2012) 10, 33

158 Cong. Rec. S3321 (May 21, 2012) 32

Justice for Victims of Terrorism Act: Hearing on H.R. 3485 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary, 106th Cong. (Apr. 13, 2000) 31

Benefits for U.S. Victims of International Terrorism: Hearing Before the S. Comm. on Foreign Relations, S. Hr'g No. 108-214 (July 17, 2003) 27

Jennifer K. Elsea, Congressional Research Service, *Suits Against Terrorist States by Victims of Terrorism* (Aug. 8, 2008) 4, 25

Menendez Hails Banking Committee Passage of Iran Sanctions Legislation (Feb. 2, 2012) 32

EXECUTIVE MATERIALS

Executive Order No. 13,599, 77 Fed. Reg. 6659 (Feb. 5, 2012) 9, 20

63 Fed. Reg. 59,201 (Oct. 21, 1998) 28

65 Fed. Reg. 66,483 (Oct. 28, 2000) 28

TABLE OF AUTHORITIES—Continued

Page(s)

79 Fed. Reg. 4522 (Jan. 28, 2014) 28

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OTHER AUTHORITIES

Kate Ackley, *Rival Groups of Terror Victims Square Off*, Roll Call, May 22, 2012 ..... 9, 32

The Federalist No. 78 (Cooke ed., 1977) (Hamilton)..... 23

W. Hawkland, *et al.*, *Uniform Commercial Code Series* (2013)..... 6, 7

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Julie Triedman, *Can U.S. Lawyers Make Iran Pay for 1983 Bombing?*, Am. Law., Oct. 28, 2013..... 20

Herman Walker, Jr., *Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int'l L. 373 (1956)..... 27

IN THE

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BANK MARKAZI,
THE CENTRAL BANK OF IRAN,
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DEBORAH D. PETERSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bank Markazi, the Central Bank of Iran, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 758 F.3d 185 (2d Cir. 2014). The opinions and orders of the district court (App., *infra*, 13a-127a) are unreported.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on July 9, 2014. It denied rehearing and rehearing en banc on September 29, 2014. App., *infra*, 128a. This Court has jurisdiction under 28 U.S.C. §1254(1). Although 28 U.S.C. §2403(a)

may apply, the court of appeals did not invoke that provision. The United States is being served with this petition.

CONSTITUTIONAL, STATUTORY, AND TREATY PROVISIONS INVOLVED

Relevant provisions of Article III of the U.S. Constitution, the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. §8772; the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1602 *et seq.*; the Terrorism Risk Insurance Act of 2002, 28 U.S.C. §1610 note; the Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899; and Article 8 of the Uniform Commercial Code are set forth in the appendix. App., *infra*, 145a-186a.

PRELIMINARY STATEMENT

This case concerns nearly $2 billion of bonds in which Bank Markazi, the Central Bank of Iran, held an interest in Europe as part of its foreign currency reserves. Plaintiffs, who hold default judgments against Iran, tried to seize the assets. Under ordinary legal principles, the assets would not have been attachable.

Plaintiffs, however, persuaded Congress to enact a statute to dictate a contrary result in this one case. By its terms, the statute applies only to "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." 22 U.S.C. §8772(b). "In order to ensure that Iran is held accountable for paying the judgments," the statute provides, the assets "shall be subject to execution" upon only two findings—essentially, that Bank Markazi has a beneficial interest in them and that no one else does. *Id.* §8772(a)(1), (2).

Relying on that statute, the district court ordered the assets turned over to plaintiffs. The Second Circuit affirmed. Conceding that there may be "little functional difference" between §8772 and a statute that simply directed the court to rule in plaintiffs' favor, the court upheld §8772 as a valid exercise of Congress's authority. App., *infra*, 10a. The question presented is whether such a statute—which effectively directs a particular result in a single pending case—violates the separation of powers.

STATEMENT

I. STATUTORY FRAMEWORK

A. The Foreign Sovereign Immunities Act

For most of this Nation's history, foreign sovereigns were completely immune from suit. See *Verlinden B.V v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). In 1952, however, the State Department adopted the "restrictive" theory of immunity that recognized limited exceptions. *Id.* at 486-487. Two decades later, Congress codified the exceptions in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§1602 *et seq.*).

The FSIA preserves the general rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. §1604. A "foreign state" includes any "agency or instrumentality of a foreign state." *Id.* §1603(a). Section 1605 then lists narrow exceptions to that immunity. *Id.* §1605.

The FSIA separately addresses the immunity of sovereign property from attachment or execution. Generally, "property in the United States of a foreign state shall be immune from attachment arrest and execution." 28 U.S.C. §1609. Section 1610 lists narrow exceptions,

but only for certain categories of "property in the United States." *Id.* §1610(a)-(b).

Section 1611(b) provides an additional, special immunity for central bank assets. Under that section, "[n]otwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if * * * the property is that of a foreign central bank or monetary authority held for its own account." 28 U.S.C. §1611(b)(1).

B. The Terrorism Amendments to the FSIA

In 1996, Congress created an exception to immunity for terrorism-related claims. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §221, 110 Stat. 1214, 1241. That exception allows suits for "torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act." 28 U.S.C. §1605A(a)(1). It applies only if the Executive Branch has designated the sovereign a "state sponsor of terrorism" prior to, or as a result of, the act at issue. *Id.* §1605A(a)(2)(A)(i)(I).

In the years since, scores of suits have been filed. Typically, the sovereign does not appear, and plaintiffs are awarded default judgments for tens or hundreds of millions of dollars. See Jennifer K. Elsea, Congressional Research Service, *Suits Against Terrorist States by Victims of Terrorism* 67-74 (Aug. 8, 2008). Plaintiffs, however, have faced difficulty collecting. See *id.* at 5-68. Congress has responded by repeatedly amending the exceptions to immunity from execution. See *ibid.*

The 1996 amendments added two exceptions. Under the first, a foreign state's property "used for a commercial activity in the United States" is not immune from execution of a terrorism-related judgment. 28 U.S.C.

§1610(a)(7). A similar exception applies to certain property of agencies or instrumentalities. *Id.* §1610(b)(3).

In 2002, Congress enacted §201 of the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, 116 Stat. 2322, 2337, to permit execution against assets the President had "blocked" (*i.e.*, frozen) under certain economic-sanctions statutes. It provides:

> Notwithstanding any other provision of law, * * * in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605A * * * , the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution * * * .

28 U.S.C. §1610 note §201(a). By its terms, TRIA applies only to "blocked *assets of* that terrorist party"—*i.e.*, property owned by that party. See *Heiser* v. *Islamic Republic of Iran*, 735 F.3d 934, 937-941 (D.C. Cir. 2013).

In 2008, Congress amended the FSIA yet again. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, §1083, 122 Stat. 3, 338. It expanded the remedies available under the terrorism exception. 28 U.S.C. §1605A. It also expanded the assets available for execution. *Id.* §1610(g).

C. Article 8 of the Uniform Commercial Code

The FSIA generally addresses only immunity, not substantive law. See *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983). The relevant substantive law here is Article 8 of the Uniform Commercial Code and its foreign equivalents.

In modern financial markets, securities owners rarely possess physical certificates. Instead, they own a "security entitlement" against an intermediary such as a bank or broker. See U.C.C. art. 8 prefatory note (1994); 7A W. Hawkland, *et al.*, *Uniform Commercial Code Series* §8-101 (2013). U.C.C. Article 8 defines the property rights in those entitlements.

The holder of a security entitlement has the right to receive interest, cast votes, and exercise other incidents of ownership. U.C.C. §§8-505 to 8-508. Rather than interacting with the issuer directly, however, the owner holds those rights against its securities intermediary. *Ibid.* The intermediary, in turn, must either own the underlying financial asset or own a security entitlement in that asset through yet another intermediary, so that it can provide the benefits of ownership to its customer. *Id.* §8-504(a). In that manner, Article 8 enables widespread holding and transfer of securities without physical transfers of the underlying securities.

Because Article 8 is built on potentially lengthy chains of ownership from intermediary to intermediary, it carefully defines attachable property rights. Section 8-112(c) provides that "[t]he interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon the securities intermediary *with whom the debtor's securities account is maintained.*" U.C.C. §8-112(c) (emphasis added). In other words, if a debtor holds a security entitlement in a bond with Bank A, which in turn holds an entitlement with Bank B, the debtor's only property is the entitlement he holds with Bank A. Creditors may be able to seize the debtor's holdings at Bank A, but they cannot go beyond that and attach Bank A's holdings at Bank B to satisfy the debtor's debts. The official comment explains:

> Process is effective only if directed to the debtor's *own* security intermediary. If Debtor holds securities through Broker, and Broker in turn holds through Clearing Corporation, *Debtor's property interest is a security entitlement against Broker.* Accordingly, Debtor's creditor cannot reach Debtor's interest by legal process directed to the Clearing Corporation.

U.C.C. §8-112 cmt. 3 (emphasis added); see also 7A Hawkland, *supra*, §8-112:01 ("Since [the debtor's] property interest is 'located' at [its intermediary], * * * the only proper subject of legal process by [the debtor's] creditors would be [that intermediary]. [The intermediary's intermediary] does not have possession of some item of property in which [the debtor] has a direct property interest * * * ").

II. PROCEEDINGS BELOW

A. Proceedings Before the District Court

1. *The Restraints and Blocking Order*

Petitioner Bank Markazi is the Central Bank of Iran. Like other central banks, it holds foreign currency reserves to carry out monetary policies such as maintaining price stability. C.A. App. 1330. Like other central banks, it often maintains the reserves in bonds issued by foreign sovereigns or "supranationals" like the European Investment Bank. *Id.* at 1331, 1146-1149.

As part of its foreign currency reserves, Bank Markazi held $1.75 billion in security entitlements in foreign government and supranational bonds at Banca UBAE S.p.A., an Italian bank. App., *infra*, 2a; C.A. App. 1329-1332, 1779. UBAE, in turn, held corresponding security entitlements in an account with another intermediary, Clearstream Banking, S.A., in Luxembourg. App., *infra*, 2a,

57a-59a. Clearstream then held corresponding security entitlements in an omnibus account at Citibank, N.A., in New York. *Id.* at 2a.[1]

Plaintiffs hold billions of dollars of default judgments against the Islamic Republic of Iran arising out of terrorist attacks by organizations that allegedly received support from Iran. App., *infra*, 2a, 52a-53a n.1, 116a. Bank Markazi is not a party to any of those judgments and is not alleged to have been involved in the attacks. See *id.* at 52a-53a n.1.

Upon learning of Bank Markazi's assets, plaintiffs did not try to attach them in Italy or Luxembourg. Instead, in June 2008, they served restraining notices on Clearstream and Citibank in New York. App., *infra*, 3a, 62a. Clearstream moved to vacate the restraints. On June 23, 2009, the district court "agree[d] with Clearstream that the assets * * * are governed by NY UCC 8-112(c)" and that, "[u]nder the plain meaning of NY UCC 8-112(c), Clearstream is not a proper garnishee" because "Clearstream does not currently carry on its books * * * an account in the name of the Islamic Republic of Iran." *Id.* at 126a. Nonetheless, the court left the restraints in place so plaintiffs could pursue their theory that the transfer to UBAE was a fraudulent conveyance. *Ibid.*; see n.1, *supra*.

In June 2010, plaintiffs commenced this action against Bank Markazi, UBAE, Clearstream, and Citibank for turnover of the restrained assets under TRIA. App., *in-*

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[1] Until February 2008, Bank Markazi held the security entitlements directly with Clearstream in Luxembourg; the parties dispute whether the transfer to UBAE was a fraudulent conveyance. App., *infra*, 57a-59a & n.2; C.A. App. 1331-1332. During the proceedings below, moreover, the bonds matured so that Citibank then held the cash proceeds. App., *infra*, 61a. At the time of judgment, the assets were worth $1.895 billion. *Id.* at 23a.

fra, 3a, 62a-63a. Later, in February 2012, the President issued an order blocking all "property and interests in property of the Government of Iran, including the Central Bank of Iran, that are in the United States," citing purported "deceptive practices" and "deficiencies in Iran's anti-money laundering regime." Executive Order No. 13,599, 77 Fed. Reg. 6659, 6659 (Feb. 5, 2012). Citibank then reported the restrained assets as blocked by that order. App., *infra*, 64a.

Bank Markazi moved to dismiss, and plaintiffs moved for summary judgment. App., *infra*, 3a, 55a. Bank Markazi urged that the security entitlements Citibank held for Clearstream were not Bank Markazi's property under U.C.C. Article 8 and thus were not "assets of" Bank Markazi under TRIA. *Id.* at 96a-97a. Even if they were, it argued, the assets were entitled to central bank immunity under FSIA § 1611(b). *Id.* at 102a. Bank Markazi also invoked the Treaty of Amity between the United States and Iran, which prohibits discrimination against Iranian companies. *Id.* at 101a (citing Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899).

2. *Congress's Enactment of § 8772*

Plaintiffs' lawyers then lobbied Congress to change the law governing the case. Press coverage reported that "lawyers and lobbyists for victims of terrorist attacks were quietly jockeying" over the legislation, and that Senator Bob Menendez was "'working with all of the plaintiff groups to ensure that the approximately $2.5 billion in Iranian blocked assets located in New York are available.'" Kate Ackley, *Rival Groups of Terror Victims Square Off*, Roll Call, May 22, 2012. The House sponsor explained that the bill sought "to change a specific part of Federal law to allow assets seized from the

Iranian Government to be allocated to [plaintiffs] to recover the judgments owed to them." 158 Cong. Rec. H5569 (Aug. 1, 2012).

The result was §502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214, 1258 (codified at 22 U.S.C. §8772). Section 8772 specifically targets the assets in this case. It applies only to "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." 22 U.S.C. §8772(b). It adds: "Nothing in this section shall be construed * * * to affect the availability, or lack thereof, of a right to satisfy a judgment * * * in any proceedings other than [those] proceedings * * * " *Id.* §8772(c)(1).

As to those assets, §8772 fundamentally changes the governing law. It provides:

> [N]otwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law, a financial asset that is—
>
> (A) held in the United States for a foreign securities intermediary doing business in the United States;
>
> (B) a blocked asset (whether or not subsequently unblocked) * * * ; and
>
> (C) equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran * * * , that such foreign securities intermediary or a related intermediary holds abroad,

> shall be subject to execution or attachment in aid of execution in order to satisfy any judgment * * *

22 U.S.C. §8772(a)(1).

The statute prescribes two "determination[s]" the court must make. 22 U.S.C. §8772(a)(2). "In order to ensure that Iran is held accountable for paying the judgments," the court must determine (1) "whether Iran holds equitable title to, or the beneficial interest in, the assets," and (2) "that no other person possesses a constitutionally protected interest in the assets." *Ibid.*

3. *The District Court's Decision*

On February 28, 2013, the district court denied Bank Markazi's motion to dismiss and granted summary judgment to plaintiffs. App., *infra*, 52a-124a.

The court held that §8772 rendered U.C.C. Article 8 irrelevant: Section 8772 "specifically trumps 'any other provision of law' and specifically permits execution on the assets specifically at issue in this litigation." App., *infra*, 97a. Nonetheless, the court deemed the assets attachable regardless, relying partly on purported statements of ownership by Bank Markazi and partly on its view that Bank Markazi's U.C.C. argument was "sophistry." *Id.* at 97a-98a & n.10, 101a.

With respect to the Treaty of Amity, the court again ruled that §8772 rendered the issue moot. App., *infra*, 102a. But it also found the Treaty inapplicable because, in its view, the Treaty could not be used to "circumvent congressional acts or authorized legal actions." *Ibid.*

As for central bank immunity, the court ruled that §8772 "expressly preempt[s] any immunity." App., *infra*, 103a. But it also held that TRIA trumps central bank immunity and that the blocking order's reference to "de-

ceptive practices" "suggests that the activities of Bank Markazi are not central banking activities." *Ibid.*

The court next turned to §8772's required findings. "On this record and as a matter of law," it held, "no other entity could have an equitable or beneficial interest" in the assets. App., *infra*, 111a. "Clearstream does not allege * * * that it has legal title or the right to acquire that title for the Blocked Assets." *Id.* at 112a. "UBAE disclaims any 'legally cognizable interest' in the Citibank proceeds." *Ibid.* And Citibank simply "maintain[s] [an] account on behalf of another." *Ibid.* In short, "[t]here simply is no other possible owner of the interests here other than Bank Markazi." *Id.* at 113a.

Bank Markazi argued that §8772 violated the separation of powers by effectively dictating the outcome of a single case. App., *infra*, 114a. But the court disagreed. "The statute does not itself 'find' turnover required," the court asserted; "such determination is specifically left to the Court." *Id.* at 114a-115a. The statutory findings, it opined, were not "mere fig leaves" but left "plenty for this Court to adjudicate." *Id.* at 115a.

On May 20, 2013, the district court denied reconsideration. App., *infra*, 31a-51a. On July 9, 2013, it entered a Rule 54(b) judgment directing turnover of the assets (while retaining jurisdiction over a different dispute involving other assets). *Id.* at 13a-30a. The judgment released Citibank and Clearstream from liability to Bank Markazi and enjoined Bank Markazi from asserting claims against them. *Id.* at 24a-26a.

B. The Court of Appeals' Opinion

The court of appeals affirmed. App., *infra*, 1a-12a.

The court acknowledged Bank Markazi's arguments that the assets at issue were not "assets of" Bank

Markazi under TRIA and that, even if they were, they were protected by central bank immunity. App., *infra*, 5a. But the court declined to reach those issues. "Congress," it explained, "has changed the law governing this case by enacting 22 U.S.C. §8772." *Ibid.*

The court then turned to Bank Markazi's separation-of-powers challenge. It recognized that *United States* v. *Klein*, 80 U.S. 128 (1872), had struck down a statute that directed courts to treat pardons of Confederate sympathizers as conclusive evidence of disloyalty. App., *infra*, 8a. Congress, *Klein* declared, may not "prescrib[e] a rule of decision to the courts." *Ibid.* But the court of appeals also noted that this Court had distinguished *Klein* in *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992). App., *infra*, 8a-9a. *Robertson* upheld a statute passed to resolve two environmental suits by deeming management of forests according to the statute's terms to satisfy applicable requirements. *Ibid.*

The court of appeals found §8772 similar to the statute in *Robertson*. "[Section] 8772 does not compel judicial findings under old law," it held, but rather "changes the law applicable to this case." App., *infra*, 9a. And like the statute in *Robertson*, it "explicitly leaves the determination of certain facts to the courts." *Ibid.*

Bank Markazi argued that §8772 "effectively compels only one possible outcome, as Iran's beneficial interest in the assets had been established by the time Congress enacted §8772." App., *infra*, 10a. The court did not deny that §8772 had that effect. But it believed the argument foreclosed by *Robertson*, "as the statute there was specifically enacted to resolve two pending cases" as well. *Ibid.* "Indeed," the court added, "it would be unusual for there to be more than one likely outcome when Congress

changes the law for a pending case with a developed factual record." *Ibid.*

The court thus conceded that "there may be little functional difference between §8772 and a hypothetical statute directing the courts to find that the assets at issue in this case are subject to attachment under existing law." App., *infra*, 10a. But it held that, under *Robertson*, "§8772 does not cross the constitutional line." *Ibid.*

The court also rejected Bank Markazi's reliance on the Treaty of Amity. "[E]ven if there were a conflict" between the Treaty and §8772, it ruled, "the later-enacted §8772 would still apply * * * ." App., *infra*, 5a. The court also denied the existence of any conflict. Although the Treaty requires treatment of Iranian companies to be "'fair and equitable' and no 'less favorable than that accorded nationals and companies of any third country,'" the court asserted that §8772 "contains no country-based discrimination" and in fact is "expressly *non*-discriminatory" because it applies only to this case. *Id.* at 7a.

The court of appeals denied rehearing and rehearing en banc on September 29, 2014. App., *infra*, 128a. On October 29, 2014, the court granted Bank Markazi's motion to stay the mandate. *Id.* at 129a.

REASONS FOR GRANTING THE PETITION

By enacting §8772, Congress legislated the outcome of a single case to ensure that nearly $2 billion of disputed assets would be turned over to plaintiffs. In doing so, it repudiated binding treaty obligations, ignored longstanding international law, and overturned substantive state property law. The Second Circuit upheld the statute as consistent with the separation of powers, even though it applies solely to this one case and effectively

dictated its outcome. No court has ever upheld such a blatant intrusion on judicial power.

If *United States* v. *Klein*, 80 U.S. 128 (1872), still has any force, Congress cannot enact such legislation. Congress passed a targeted statute to change the outcome of one case. Although it purported to require two findings, they were makeweights; the Second Circuit never suggested otherwise. And this case squarely presents the issue left open in *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992): whether a statute is unconstitutional if it "swe[eps] no more broadly * * * than the range of applications at issue in [one] pending case[]." *Id.* at 441.

Section 8772 is merely the latest of several instances of Congress's disregard for separation-of-powers principles to favor sympathetic plaintiffs. The statute not only violates United States treaty obligations and imperils the United States' reputation as a safe custodian for central bank reserves. It also threatens the judiciary's ability to operate as an independent branch rather than a mere adjunct resolving property disputes as the legislature may direct. This Court should grant review.

I. THIS CASE PRESENTS IMPORTANT SEPARATION-OF-POWERS QUESTIONS LEFT OPEN IN *ROBERTSON*

Klein made clear that Article III prohibits Congress from exercising judicial power by legislating the outcome of a particular case. This Court, however, has not clearly defined the scope of that prohibition. This case tests *Klein*'s limits.

A. *Klein* Prohibits Congress from Dictating the Outcome of a Particular Case

1. In *Klein*, this Court addressed a post-Civil War statute designed to prevent pardoned Confederate sympathizers from prevailing in suits against the govern-

ment. An 1863 statute had authorized the Secretary of the Treasury to seize and sell abandoned or captured property during the war. Ch. 120, §1, 12 Stat. 820, 820 (1863). The owner could sue in the court of claims after the war to recover the proceeds, but had to prove his loyalty to the United States. *Id.* §3.

In *United States* v. *Padelford*, 76 U.S. 531 (1870), this Court held that acts of disloyalty would be disregarded if the claimant had been pardoned. *Id.* at 541-543. A few months later, Congress included a rider in an appropriations bill stating that a pardon was not "admissible in evidence on the part of any claimant"; to the contrary, if the pardon recited acts of disloyalty that the recipient had not denied upon being pardoned, the statute required that it be deemed "conclusive evidence that such person did take part in and give aid and comfort to the late rebellion." Ch. 251, 16 Stat. 230, 235 (1870).

This Court held the statute unconstitutional. Congress, it concluded, had "passed the limit which separates the legislative from the judicial power." *Klein*, 80 U.S. at 147. The statute purported to dictate the outcome of pending cases "founded solely on the application of a rule of decision * * * prescribed by Congress." *Id.* at 146. That was impermissible: Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Ibid.*

Klein distinguished the Court's earlier decision in *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1856). In *Wheeling Bridge*, the Court had found a bridge to be an obstruction to navigation and ordered its removal. *Id.* at 429. Congress responded by passing a statute declaring the bridge to be a federal post-road. *Ibid.* That statute, *Klein* explained, left the Court "to apply its ordinary rules to the new circumstances created

by the act." 80 U.S. at 146-147. In *Klein*, by contrast, Congress had "prescribe[d] a rule in conformity with which the court must [decide the case]." *Id.* at 147.

2. This Court revisited *Klein*'s scope in *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992). *Robertson* arose out of two suits alleging that the government's plans to allow certain timber harvesting violated federal environmental statutes. *Id.* at 432. While the suits were pending, Congress enacted legislation that "established a comprehensive set of rules to govern harvesting within a geographically and temporally limited domain." *Id.* at 433-434 & n.1 (citing Pub. L. No. 101-121, §318(b)(3), (5), 103 Stat. 701, 746-747 (1989)). The statute provided that "management of areas according to [the new rules] * * * is adequate consideration for the purpose of meeting the statutory requirements that are the basis for [the suits]." Pub. L. No. 101-121, §318(b)(6)(A), 103 Stat. at 747.

The Court rejected the claim that the statute violated *Klein*. The statute, it explained, "compelled changes in law, not findings or results under old law." 503 U.S. at 438. The Court "f[ound] nothing in [the statute] that purported to direct any particular findings of fact or applications of law." *Ibid.* Rather, the statute "expressly reserved judgment upon 'the legal and factual adequacy' of the administrative documents authorizing [certain] sales" and "expressly provided for *judicial* determination of the lawfulness of [other] sales." *Id.* at 438-439.

An *amicus* argued that "even a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases." 503 U.S. at 441. But "[t]his alternative theory was neither raised below nor squarely considered by the

Court of Appeals, nor was it advanced by respondents in this Court," so the Court "decline[d] to address it." *Ibid.*

B. *Klein*'s Scope Remains Uncertain

Confusion over *Klein*'s scope is pervasive. The D.C. Circuit has described *Klein* as "a bit of a constitutional Sphinx." *Janko* v. *Gates*, 741 F.3d 136, 146 (D.C. Cir. 2014), petition for cert. filed, No. 14-650 (Nov. 26, 2014). The Tenth Circuit has observed that "*Klein* is a notoriously difficult decision to interpret." *Biodiversity Assocs.* v. *Cables*, 357 F.3d 1152, 1170 (10th Cir. 2004) (McConnell, J.), cert. denied, 543 U.S. 817 (2004). And the Second Circuit has agreed that "[w]hether a statute provides only the standard to which courts must adhere or compels the result that they must reach can be a vexed question." *Benjamin* v. *Jacobson*, 124 F.3d 162, 174 (2d Cir. 1997), vacated, 172 F.3d 144 (2d Cir. 1999), cert. denied, 528 U.S. 824 (1999).

Courts of appeals have articulated *Klein*'s scope in varying ways. The Seventh Circuit has interpreted the case to mean that, while Congress "may make rules that affect *classes* of cases," it "cannot tell courts how to decide a *particular* case." *Lindh* v. *Murphy*, 96 F.3d 856, 872 (7th Cir. 1996) (en banc) (emphasis added), rev'd on other grounds, 521 U.S. 320 (1997). Thus, while Congress "may prescribe maximum damages for categories of cases," it "cannot say that a court must award Jones $35,000 for being run over by a postal truck." *Ibid.*

The D.C. Circuit, by contrast, has reached the question reserved in *Robertson* and held that it is "unobjectionable" for Congress to target a particular case. *Nat'l Coal. To Save Our Mall* v. *Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001), cert. denied, 537 U.S. 813 (2002). While conceding that "*Klein*'s exact meaning is far from clear," the court saw "no reason why the specificity should sud-

denly become fatal merely because there happened to be a pending lawsuit." *Id.* at 1096-1097.

C. This Case Squarely Presents Important Issues Left Open in *Robertson*

This case presents the important questions about *Klein*'s scope that the Court left open in *Robertson*. And it does so in a context—where Congress sought to compel the transfer of nearly $2 billion from one litigant to another—that calls out for resolution.

Section 8772 applies to one case and one case alone. It governs only "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." 22 U.S.C. §8772(b). For good measure, it adds that "[n]othing in this section shall be construed * * * to affect * * * any proceedings other than [those] proceedings." *Id.* §8772(c)(1). The statute thus not only identifies this case by caption and docket number, but expressly disclaims any broader effect.

The Second Circuit nonetheless upheld the statute because it purported to require two judicial "findings" before the assets were awarded to plaintiffs: (1) that "Iran holds equitable title to, or the beneficial interest in, the assets"; and (2) that "no other person possesses a constitutionally protected interest." 22 U.S.C. §8772(a)(2). Neither finding, however, left anything meaningful for the court to decide—indeed, both were forgone conclusions.

The Second Circuit never held otherwise. To the contrary, it conceded that "there may be little functional difference" between §8772 and a statute that simply decided the case. App., *infra*, 10a. Indeed, the court thought it "unusual for there to be more than one likely

outcome when Congress changes the law for a pending case with a developed factual record." *Ibid.* The court thus held §8772 constitutional *even if*, as Bank Markazi contended, it left no meaningful role to the courts.

There was good reason for the court not to dispute that premise. The statute effectively directed that plaintiffs prevail—collecting almost $2 billion—so long as Bank Markazi had an interest in the assets and no one else did. That is like directing judgment for a plaintiff on the sole condition that the judgment runs *only* against the defendant. That is practically no condition at all.

Moreover, there was never any serious question that Bank Markazi had a "beneficial interest" in the assets. Plaintiffs first learned of the assets in June 2008 only because the Treasury Department's Office of Foreign Assets Control advised them that an Iranian government entity had an interest in the assets. See Julie Triedman, *Can U.S. Lawyers Make Iran Pay for 1983 Bombing?*, Am. Law., Oct. 28, 2013; C.A. App. 1386. And by the time Congress enacted §8772, the President had blocked the assets *precisely because* they were "interests in property" of Bank Markazi. 77 Fed. Reg. at 6659.

The finding that no other person had an interest in the assets likewise was not a meaningful reservation of judicial authority. The statute excluded a "custodial interest of a foreign securities intermediary * * * that holds the assets abroad for the benefit of Iran." 22 U.S.C. §8772(a)(2)(A). It thus excluded interests of UBAE or Clearstream—the only other parties with plausible claims. By the time Congress enacted §8772, moreover, Citibank had filed its interpleader complaint disclaiming any interest. See App., *infra*, 54a; C.A. App. 1362. It was thus abundantly clear that no other party had a cognizable interest. And if someone did have a "*constitutionally* pro-

tected interest," of course, courts would have to consider the claim even without the statute.[2]

The Second Circuit thought that *Robertson* precluded any inquiry into whether the findings were meaningful. App., *infra*, 10a. But nothing in *Robertson* suggests that Congress can avoid *Klein* merely by requiring "findings" on collateral uncontested issues. *Robertson* upheld the statute there because it "expressly reserved judgment upon 'the legal and factual adequacy' of the administrative documents" and "expressly provided for *judicial* determination of the lawfulness of * * * sales." 503 U.S. at 438-439. There was no suggestion those findings were makeweights.

If Article III prevents Congress from "say[ing] that a court must award Jones $35,000 for being run over by a postal truck," *Lindh*, 96 F.3d at 872, it surely also prevents Congress from awarding the same amount conditioned on findings that the $35,000 is the defendant's and not someone else's. Yet that is effectively what Congress did here—to the tune of almost $2 billion. By upholding that law, the Second Circuit divested *Klein* of all force.

The correctness of that holding is a critical issue for the separation of powers. The federal courts are an independent branch of government, not mere handmaidens to legislative directives. As a result, Congress cannot enact a law that directs the entry of judgment for a plaintiff. Congress cannot avoid that prohibition by directing

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[2] The district court asserted that the statute left "plenty for [it] to adjudicate." App., *infra*, 115a. But that claim is hard to square with the court's actual analysis, which occupied only two paragraphs of its lengthy opinion and largely just recited various admissions about the assets' status. See *id.* at 111a-113a. In any event, the *court of appeals* did not rely on that assertion, much less agree with it. And it is the court of appeals' holding that this Court would review.

judgment conditioned only on a finding that the assets do not belong to someone other than the defendant.

Even if the findings §8772 required were meaningful, the statute would still offend the separation of powers by purporting to change the governing law for this one case alone. Section 8772 could not be more targeted. It not only identifies this case by caption and docket number, but expressly declares that it has no effect beyond this one case. 22 U.S.C. §8772(b), (c)(1). Congress's intent to interfere with the adjudication of one particular case is thus explicit. The decision below thus presents the question this Court reserved in *Robertson*—whether a change in law is unconstitutional if it "swe[eps] no more broadly * * * than the range of applications at issue in [a] pending case[]." 503 U.S. at 441.

Even where a statute does not conclusively resolve a case, it offends basic norms of legislative and adjudicative process for Congress to change the governing law solely for purposes of one case, and solely to benefit the preferred litigant. If *Klein* forbids Congress from directing judgment for a party, it likewise must prohibit Congress from achieving the same result by dramatically changing the law to favor that party, solely for purposes of that one case. Either way, Congress arrogates to itself the role of resolving specific cases and controversies that the Constitution reserves to the judiciary.

II. The Constitutional Issues Are Important And Recurring

A. The Question Presented Raises Fundamental Separation-of-Powers Issues

The importance of protecting the authority and independence of the judicial branch cannot be overstated. The Framers "lived among the ruins of a system of inter-

mingled legislative and judicial powers" in which impartial judicial administration was often marred by "abuses of legislative interference with the courts at the behest of private interests and factions." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 219-221 (1995). The Framers felt the "sense of a sharp necessity to separate the legislative from the judicial power." *Id.* at 221. Article III is thus an "'inseparable element of the constitutional system of checks and balances' that 'both defines the power and protects the independence of the Judicial Branch.'" *Stern* v. *Marshall*, 131 S. Ct. 2594, 2608 (2011).

Article III "safeguards the role of the Judicial Branch in our tripartite system." *CFTC* v. *Schor*, 478 U.S. 833, 850 (1986). It is also essential to individual liberty. "'[T]here is no liberty,'" the Framers knew, "'if the power of judging be not separated from the legislative and executive powers.'" *The Federalist No. 78*, at 561 (Cooke ed., 1977) (Hamilton) (quoting Montesquieu). The separation of powers thus not only "protect[s] each branch of government from incursion by the others," but "protect[s] the individual as well." *Bond* v. *United States*, 131 S. Ct. 2355, 2365 (2011).

Given that critical importance, this Court has not hesitated to review separation-of-powers cases, even absent a clear circuit conflict. See, *e.g.*, *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Cheney* v. *U.S. Dist. Court*, 542 U.S. 367 (2004); *Freytag* v. *Comm'r*, 501 U.S. 868 (1991). The issues are no less important here.

B. Congress Has Repeatedly Disregarded Separation-of-Powers Principles in This Context

The question presented is not merely important, but recurring as well. In recent years, Congress has repeatedly intervened in lawsuits to help one particular set

of plaintiffs—terrorism victims—prevail against foreign governments.

In 2000, for example, individuals detained during the 1979 Iran hostage crisis tried to sue Iran, notwithstanding the United States' settlement with Iran in the Algiers Accords. See *Roeder* v. *Islamic Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003), cert. denied, 542 U.S. 915 (2004). While the suit was pending, Congress enacted a new exception to sovereign immunity that applied solely to that case, identified by docket number in the statute. See Pub. L. No. 107-77, §626(c), 115 Stat. 748, 803 (2001) (adding the words "or the act is related to Case Number 1:00CV03110(ESG) in the United States District Court for the District of Columbia" to existing immunity exception), amended by Pub. L. No. 107-117, §208, 115 Stat. 2230, 2299 (2002) (correcting typo in docket number) (currently codified at 28 U.S.C. §1605A(a)(2)(B)).

On appeal, the D.C. Circuit recognized that "it is open to question whether Congress may dictate the outcome of a particular judicial proceeding" and reserved judgment as to "whether the amendments, relating as they did specifically to a pending action, violated separation-of-powers principles by impermissibly directing the result of pending litigation." 333 F.3d at 237 & n.5 (citing *Plaut* and *Robertson*); see also *id.* at 231 (quoting district court's observation that "Congress' intent to interfere with this litigation was clear"). Ultimately, the court did not reach the issue, because it held the claims barred by the Algiers Accords. *Id.* at 237-238.

Congress disregarded the separation of powers again when it expanded the FSIA's terrorism exception in 2008. 28 U.S.C. §1605A. Congress included a provision allowing plaintiffs who had already litigated their case to judgment to refile their claims under the new statute. Pub. L.

No. 110-181, §1083(c)(2), 122 Stat. 3, 342 (2008). The Congressional Research Service observed that the statute "may be vulnerable to invalidation as an improper exercise of judicial powers by Congress." Elsea, *supra*, at 61. And courts have disagreed over its constitutionality. Compare *Kumar* v. *Republic of Sudan*, No. 2:10cv171, 2011 WL 4369122, at *11 (E.D. Va. Sept. 19, 2011) (finding constitutional violation), rev'd on other grounds *sub nom. Clodfelter* v. *Republic of Sudan*, 720 F.3d 199 (4th Cir. 2013), with *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 68-70 (D.D.C. 2009) (upholding statute despite "legitimate question of whether this enactment offends deeply entrenched constitutional principles relating to the separation of powers and the ability of the judiciary to function independently without interference from the political process" (citing *Klein*)).

Now, Congress has done it again. This case is just the latest—and most extreme—example of Congress's willingness to test the constitutional boundary between itself and the judicial branch.

III. This Case Has Important International Ramifications

A. The Decision Below Puts the United States in Violation of Its Treaty Obligations

The Second Circuit's decision is also important because it puts the United States in breach of its solemn treaty obligations. Article IV.1 of the Treaty of Amity requires the United States to "accord fair and equitable treatment to nationals and companies of [Iran]," and to "refrain from applying *unreasonable or discriminatory measures* that would impair their legally acquired rights and interests." Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, art. IV.1, Aug. 15, 1955, 8 U.S.T. 899, 903 (emphasis added). Section 8772 plainly

violates that provision. It is hard to imagine a more "unreasonable or discriminatory" measure than one that allows seizure of an Iranian entity's assets, because the entity is Iranian, and orders them paid over to private plaintiffs notwithstanding any state, federal, or international legal principle that would otherwise bar the seizure.

The Second Circuit saw "no country-based discrimination." App., *infra*, 7a. But it ignored the statute's plain terms. Section 8772 applies *only* to assets "equal in value to a financial asset *of Iran*"; it requires the court to find that "*Iran* holds equitable title to, or the beneficial interest in, the assets"; and its purpose is "to ensure that *Iran* is held accountable for paying the judgments." 22 U.S.C. §8772(a)(1)(C), (2) (emphasis added). While the court emphasized that the statute applies only to this case, App., *infra*, 7a, that makes no difference. Whether a statute singles out *one* Iranian instrumentality for arbitrary treatment or *all* of them, it is still a "discriminatory measure[]" that singles out an Iranian instrumentality because it is Iranian. Art. IV.1, 8 U.S.T. at 903.[3]

The Second Circuit also held that §8772 would abrogate any inconsistent Treaty provision. App., *infra*, 5a-6a. But an abrogation is still a breach. "That a * * * provision of an international agreement is superseded as domestic law does not relieve the United States of its in-

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[3] Bank Markazi, moreover, is not even a party to the underlying judgments. See App., *infra*, 52a-53a n.1. Article III.1 of the Treaty requires the United States to respect the "juridical status" of Iranian entities. 8 U.S.T. at 902; see App., *infra*, 6a-7a. And this Court has made clear that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-627 (1983). By allowing seizure of Bank Markazi's purported assets to satisfy Iran's debts, Congress violated those principles as well.

ternational obligation or of the consequences of a violation of that obligation." *Restatement (Third) of the Foreign Relations Law of the United States* §115(1)(b) (1987).

That breach could expose the United States to claims in the International Court of Justice, which has authority to resolve Treaty disputes. Art. XXI.2, 8 U.S.T. at 913; see, *e.g.*, *Oil Platforms (Iran* v. *U.S.)*, 2003 I.C.J. 161 (Nov. 6). The State Department has warned that, when Iranian property is distributed to private plaintiffs, the United States may confront claims in international tribunals, "where we will have to account for it." *Benefits for U.S. Victims of International Terrorism: Hearing Before the S. Comm. on Foreign Relations*, S. Hr'g No. 108-214, at 8 (July 17, 2003).

The decision below also calls into question the United States' commitment to its treaty obligations generally. The Treaty of Amity is but one of more than a dozen similar treaties the United States has signed. See *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 185-186 & n.13 (1982); Herman Walker, Jr., *Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int'l L. 373, 373 n.1 (1956). The Nation's repudiation of its obligations here gives other treaty partners reason to doubt its commitment. In *Sumitomo*, this Court cited the fact that "treaty provisions similar to that invoked by [petitioner] are in effect with many other countries" as a reason the question there was "clearly of widespread importance." 457 U.S. at 182 n.7. The same reasoning applies here.

B. The Decision Below Undermines the President's Authority over Foreign Affairs

Section 8772 also interferes with the President's ability to conduct foreign affairs. As this Court has explained, "the congressional purpose in authorizing block-

ing orders is 'to put control of foreign assets in the hands of the President.'" *Dames & Moore* v. *Regan*, 453 U.S. 654, 673 (1981). "The frozen assets serve as a 'bargaining chip' to be used by the President when dealing with a hostile country." *Ibid.* The Court has thus been reluctant to "allow individual claimants throughout the country to minimize or wholly eliminate this 'bargaining chip' through attachments." *Ibid.*

For the same reason, the Executive Branch has repeatedly opposed using blocked assets to pay judgments. The President twice invoked statutory authority to waive provisions permitting such payments, finding that they would "impede [his] ability * * * to conduct foreign policy in the interest of national security." 63 Fed. Reg. 59,201 (Oct. 21, 1998); 65 Fed. Reg. 66,483 (Oct. 28, 2000). Using blocked assets to pay plaintiffs, he warned, would "effectively eliminate" an "important source of leverage," "seriously affect our ability to enter into global claims settlements," and threaten liability in international tribunals. 1998 Pub. Papers 1843, 1847 (Oct. 23, 1998); see also 2002 Pub. Papers 1697, 1699 (Sept. 30, 2002) (invoking "prerogatives * * * in the area of foreign affairs").

The need to preserve that authority is especially acute today. The President has questioned the wisdom of "[m]any years of refusing to engage Iran." *National Security Strategy* 26 (May 2010). The United States is thus currently involved in ongoing multilateral negotiations with the country. 79 Fed. Reg. 4522 (Jan. 28, 2014); 79 Fed. Reg. 45,228 (Aug. 4, 2014); 79 Fed. Reg. 73,141 (Dec. 9, 2014). As part of that process, Iran will "gain access, in installments, to $4.2 billion of its restricted revenues now held in overseas accounts." 79 Fed. Reg. at 4522. "Imposing additional sanctions now," the President has warned, "will only risk derailing our efforts * * * " 2014

Daily Comp. Pres. Doc. 14, at 1 (Jan. 12, 2014). The decision below threatens those negotiations. Other statutes such as TRIA may already impair the President's authority to some degree. But §8772—which directs turnover of nearly $2 billion without regard to customary standards—raises that interference to a whole new level.

C. The Decision Undermines Confidence in U.S. Financial Markets

The Second Circuit's decision also undermines the United States' reputation as a safe custodian for central bank reserves. Congress enacted central bank immunity in §1611(b) to avoid "significant foreign relations problems" and to encourage the "deposit of foreign funds in the United States." H.R. Rep. No. 94-1487, at 31 (1976). "[F]oreign central banks are not treated as generic 'agencies and instrumentalities' of a foreign state under the FSIA; they are given 'special protections' befitting the particular sovereign interest in preventing the attachment and execution of central bank property." *NML Capital, Ltd.* v. *Banco Central de la República Argentina*, 652 F.3d 172, 188 (2d Cir. 2011), cert. denied, 133 S. Ct. 23 (2012). That special treatment tracks international norms. See United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, art. 21(1)(c), U.N. Doc. A/RES/59/38 (Dec. 2, 2004) (immunity for "property of the central bank or other monetary authority").

Section 8772 defies those goals. Foreign central banks can hardly be expected to deposit reserves at U.S. institutions if the funds are at risk of being seized whenever Congress wants to favor plaintiffs with well-connected lawyers. The impact is not limited to politically unpopular nations. The assets seized here were not *Bank Markazi's* foreign reserves, but rather assets deposited at

Citibank by *Clearstream*, a European securities intermediary, that were merely "equal in value to a financial asset of Iran * * * that [a] foreign securities intermediary * * * holds abroad." 22 U.S.C. §8772(a)(1)(C). The district court effectively allowed plaintiffs to circumvent territorial limitations by treating the New York assets as a proxy for Bank Markazi's unattachable holdings in Europe. The decision thus discourages not just countries like Iran from holding reserves here, but also intermediaries in friendly nations like Luxembourg.

D. The Decision Invites Retaliation by Foreign Governments

A key justification for the FSIA's enactment was to promote U.S. interests by encouraging reciprocal treatment under foreign law. See H.R. Rep. No. 94-1487, at 31 (exemption for military property encourages "reciprocal application" under foreign law); cf. *id.* at 29-30 ("If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations * * * ."). The Executive Branch has thus opposed efforts to restrict immunity, citing the potential for retaliatory measures that would imperil U.S. property abroad. See, *e.g.*, 2007 Pub. Papers 1592, 1593-1594 (Dec. 28, 2007) (vetoing provision that "would be viewed with alarm by the international community and would invite reciprocal action against United States assets abroad").

Section 8772 raises precisely such concerns. By dictating the outcome of a case against a foreign sovereign, the statute invites other countries to intervene in litigation against the United States in their own courts. If this sort of legislation passes muster in a country with a supposedly well-developed legal system and commitment to the

rule of law, it is hard to see why countries with more developing systems should feel any compunction about changing the rules for their own preferred litigants.

The United States will ultimately be worse off. "U.S. citizens, corporations, the United States government, and taxpayers have far more money invested abroad than those of any other country, and thus have more to lose if investment protections * * * [are] eroded." *Justice for Victims of Terrorism Act: Hearing on H.R. 3485 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 106th Cong. 54 (Apr. 13, 2000) (joint statement of the State, Treasury, and Defense Departments) (emphasis omitted). For that reason too, the case warrants review.

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This Court often grants certiorari due to a case's impact on foreign relations. See, *e.g.*, *Christopher* v. *Harbury*, 536 U.S. 403, 412 (2002) (citing "importance of th[e] issue to the Government in its conduct of the Nation's foreign affairs"); *JPMorgan Chase Bank* v. *Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91 (2002). At a minimum, the Court should invite the Solicitor General to express the views of the United States, as it has done in similar cases. See, *e.g.*, *Rubin* v. *Islamic Republic of Iran*, 132 S. Ct. 1619 (2012); *Bank Melli Iran N.Y. Representative Office* v. *Weinstein*, 131 S. Ct. 3012 (2011); *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Elahi*, 552 U.S. 1176 (2008).

IV. THIS CASE IS AN EXCELLENT VEHICLE

This case is also an excellent vehicle for review. It presents the *Klein* issue in its starkest form: a private suit for money. Sometimes, *Klein* arguments are raised in administrative challenges to government action. See,

e.g., *Robertson*, 503 U.S. at 432. But *Klein* might not apply to such suits involving "public rights." See *Biodiversity Assocs.*, 357 F.3d at 1170-1171. This case, however, involves paradigmatic private rights: a demand for money as compensation for losses. "[V]ery different considerations" arise when Congress tries to prescribe the outcome of an "action * * * at common law for damages." *The Clinton Bridge*, 77 U.S. 454, 463 (1870). This is the proverbial case where Congress has "sa[id] that a court must award Jones $35,000 for being run over by a postal truck." *Lindh*, 96 F.3d at 872.

Congress, moreover, could not have been more explicit about its intent to direct the outcome of a single case. It identified this case by caption and docket number in the statutory text. 22 U.S.C. §8772(b). The statute's express purpose is "to ensure that Iran is held accountable for paying the judgments." *Id.* §8772(a)(2). And the only findings the statute requires—that Bank Markazi rather than someone else has a beneficial interest in the assets—are so anemic that the Second Circuit all but conceded they are makeweights. See App., *infra*, 10a.

The statute's author, Senator Menendez, issued a press release explaining that the bill "makes it so that the [plaintiffs] will be able to attach two billion in Iranian Central Bank assets being held at a New York Bank." *Menendez Hails Banking Committee Passage of Iran Sanctions Legislation* (Feb. 2, 2012). News reports confirmed that he was "'working with all of the plaintiff groups to ensure that the approximately $2.5 billion in Iranian blocked assets located in New York are available.'" Ackley, *supra*. And he reiterated on the Senate floor that he "wanted to be sure that there was understanding on the record that Iran * * * should not be able to avoid having its assets attached." 158 Cong. Rec.

S3321 (May 21, 2012). The House sponsor agreed that the statute sought to "allow assets seized from the Iranian Government to be allocated to [plaintiffs] to recover the judgments owed to them." 158 Cong. Rec. H5569 (Aug. 1, 2012). "It is time that Iran is held accountable," he opined, and the statute would "offer [plaintiffs] the justice that they have long been denied." *Ibid.* Congress's intent to make plaintiffs prevail was thus unmistakable.

Finally, the issue's importance is underscored by the massive amount of money at stake. Congress effectively directed that nearly $2 billion held by Citibank, for another bank, ultimately for Bank Markazi's benefit be paid over to plaintiffs. Such a huge wealth transfer in violation of ordinary legal principles sets a very high-profile—and very bad—precedent for the predictability of the Nation's financial markets and the integrity of its judicial system. This Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2014

APPENDIX

APPENDIX A
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 13-2952-CV

DEBORAH D. PETERSON, *et al.*,
Plaintiffs-Appellees,

v.

ISLAMIC REPUBLIC OF IRAN, *et al.*,
*Defendants-Appellants.**

Appeal from the United States District Court
for the Southern District of New York

Argued: May 19, 2014
Decided: July 9, 2014

Before WINTER, WALKER, and CABRANES, Circuit Judges.

JOHN M. WALKER, JR., Circuit Judge.

To satisfy terrorism-related judgments against Iran, the district court (Forrest, *J.*) awarded turnover of $1.75 billion in assets under both the Terrorism Risk Insurance Act of 2002 ("TRIA") and a statute enacted specifically to address the assets at issue in this case, 22 U.S.C. § 8772. Although Iran argues that the TRIA ownership require-

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* Consistent with the order entered by this Court on October 18, 2013, ECF No. 118, we use the short-form caption for the purpose of publishing this opinion.

ments have not been satisfied, we need not reach this issue in light of Congress's enactment of § 8772. Iran concedes that the statutory elements for turnover of the assets under § 8772 have been satisfied, and we reject Iran's arguments that § 8772 conflicts with the Treaty of Amity between the United States and Iran, violates separation of powers, and effects an unconstitutional taking. We also conclude that the district court did not abuse its discretion in issuing an anti-suit injunction to protect its judgment. We AFFIRM.

BACKGROUND

Plaintiffs-appellees are the representatives of hundreds of Americans killed in multiple Iran-sponsored terrorist attacks, and they have billions of dollars in unpaid compensatory damages judgments against Iran stemming from these attacks.[1] Defendant-appellant Bank Markazi is the Central Bank of Iran, which is wholly owned by the Iranian government. The assets at issue in this appeal are $1.75 billion in cash proceeds of government bonds, currently held in New York by defendant Citibank, N.A., in an omnibus account for defendant Clearstream Banking, S.A., a financial intermediary. One of the customers for whom Clearstream maintains this account is defendant Banca UBAE S.p.A., an Italian bank whose customer, in turn, is Bank Markazi. Bank Markazi concedes that through this chain of parties it has at least a "beneficial interest" in the assets at issue. Plaintiffs seek turnover of these assets to satisfy their judgments.

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[1] The appellees first entered this action in various procedural postures, but they are all judgment creditors of Iran and are referred to collectively as "plaintiffs" for ease of reference.

When plaintiffs first learned of Bank Markazi's interest in the assets in 2008, they obtained restraints against transfer of the assets. In 2010, plaintiffs initiated this action against Bank Markazi, UBAE, Clearstream, and Citibank to obtain turnover of the assets under section 201(a) of the TRIA, which provides that "in every case in which a person has obtained a judgment against a terrorist party the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment." Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201(a), 116 Stat. 2322, 2337 (codified at 28 U.S.C. § 1610 Note "Satisfaction of Judgments from Blocked Assets of Terrorists, Terrorist Organizations, and State Sponsors of Terrorism").

In February 2012, while this action was pending, President Obama issued Executive Order 13,599, which stated:

> [I]n light of the deceptive practices of [Bank Markazi] to conceal transactions of sanctioned parties [a]ll property and interests in property of the Government of Iran, including [Bank Markazi], that are in the United States . or that are or hereafter come within the possession or control of any United States person are blocked

Exec. Order No. 13,599, 77 Fed. Reg. 6659, 6659 (Feb. 5, 2012). The assets at issue (which were still under restraint) were blocked based on this Executive Order. Plaintiffs then filed a motion for partial summary judgment on their TRIA claim.

In August 2012, while that motion was pending, Congress passed the Iran Threat Reduction and Syria Human Rights Act of 2012. That Act included a section, codified at 22 U.S.C. § 8772, which stated that "the financial

assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in *Peterson et al.* v. *Islamic Republic of Iran et al.*, Case No. 10 Civ. 4518" "shall be subject to execution . . in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death caused by an act of [terrorism]." Pub. L. No. 112-158, § 502, 126 Stat. 1214, 1258. Plaintiffs then filed a supplemental motion for summary judgment under § 8772.

In March 2013, the district court granted summary judgment to plaintiffs, ordering turnover of the assets on the two independent bases of TRIA section 201(a) and 22 U.S.C. § 8772. *Peterson* v. *Islamic Republic of Iran*, No. 10 Civ. 4518, 2013 WL 1155576 (S.D.N.Y. Mar. 13, 2013). In July 2013, the district court issued an order directing turnover of the blocked assets and enjoining the parties from initiating a claim to the assets in another jurisdiction. *Peterson* v. *Islamic Republic of Iran*, No. 10 Civ. 4518 (S.D.N.Y. July 9, 2013), ECF No. 463. Post-judgment, plaintiffs settled with Clearstream and UBAE, and Citibank is a neutral stakeholder, leaving Bank Markazi as the sole appellant.

DISCUSSION

"We review *de novo* a district court's grant of summary judgment, construing the evidence in the light most favorable to the non-movant, asking whether there is a genuine dispute as to any material fact and whether the movant is entitled to judgment as a matter of law." *Padilla* v. *Maersk Line, Ltd.*, 721 F.3d 77, 81 (2d Cir. 2013) (citing Fed. R. Civ. P. 56(a)). "We [also] review *de novo* the district court's legal conclusions, including those interpreting and determining the constitutionality of a statute," *United States* v. *Stewart*, 590 F.3d 93, 109 (2d

Cir. 2009), or involving the "interpretation of a treaty," *Swarna* v. *Al-Awadi*, 622 F.3d 123, 132 (2d Cir. 2010).

Bank Markazi argues that the assets at issue are not "assets of" Bank Markazi as required for turnover under TRIA section 201(a), and that even if the assets were held to be "assets of" Bank Markazi, then they would be "the property of a foreign central bank . held for its own account" and thus "immune from attachment and from execution" under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1611(b)(1). We need not resolve this dispute under the TRIA, however, as Congress has changed the law governing this case by enacting 22 U.S.C. § 8772. Bank Markazi concedes that plaintiffs have satisfied the statutory elements of their § 8772 claim but argues that turnover under this provision (1) conflicts with the Treaty of Amity between the United States and Iran; (2) violates separation of powers under Article III; and (3) violates the Takings Clause. As we explain below, none of these arguments has merit. We also reject Bank Markazi's challenge to the district court's anti-suit injunction.

I. Treaty of Amity

Bank Markazi argues that turnover of the assets under § 8772 would conflict with obligations of the United States under the Treaty of Amity, which is a self-executing treaty between the United States and Iran that was signed in 1955. Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, Aug. 15, 1955, 8 U.S.T. 899; see also *McKesson Corp.* v. *Islamic Republic of Iran*, 539 F.3d 485, 488 (D.C. Cir. 2008) ("The Treaty of Amity, like other treaties of its kind, is self-executing."). But even if there were a conflict, the later-enacted § 8772 would still apply: "The Supreme Court has held explicitly that legislative acts

trump treaty-made international law, stating that 'when a statute which is subsequent in time [to a treaty] is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.'" *United States* v. *Yousef*, 327 F.3d 56, 110 (2d Cir. 2003) (alteration in original) (quoting *Breard* v. *Greene*, 523 U.S. 371 (1998)); see also *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888) ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation ... [and] if the two are inconsistent, the one last in date will control the other."). Indeed, when Iran raised a similar argument against turnover under TRIA section 201(a) in a different case, we concluded that even if this provision conflicted with the Treaty of Amity, "the TRIA would have to be read to abrogate that portion of the Treaty." *Weinstein* v. *Islamic Republic of Iran*, 609 F.3d 43, 53 (2d Cir. 2010).[2]

In any event, we see no conflict between § 8772 and the Treaty of Amity. Bank Markazi first contends that Congress's inclusion of Bank Markazi in its definition of "Iran" in § 8772(d)(3) violates Article III.1 of the Treaty, which states that Iranian companies "shall have their juridical status recognized within" the United States. But as Bank Markazi acknowledges, this argument has been rejected by our Court in the context of a similar provision in the TRIA. See *Weinstein*, 609 F.3d at 53 (concluding that Iran's argument was foreclosed by the Supreme

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[2] Additionally, § 8772, like TRIA section 201(a), contains a broad provision stating that it applies "notwithstanding any other provision of law," 22 U.S.C. § 8772(a)(1), and "the Courts of Appeals have regularly interpreted such 'notwithstanding' provisions 'to supersede all other laws,'" *Weinstein*, 609 F.3d at 53 (quoting *Cisneros* v. *Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993)).

Court's analysis of similar provisions in *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176 (1982)).

Bank Markazi also argues that § 8772 violates Articles IV.1 and V.1, which require that treatment of Iranian companies and their property interests be "fair and equitable" and no "less favorable than that accorded nationals and companies of any third country." But the provision of § 8772 that Bank Markazi points to contains no country-based discrimination; rather, it simply states that "[n]othing in this section shall be construed . to affect the availability, or lack thereof, of a right to satisfy a judgment in any other action against a terrorist party in any proceedings other than [these] proceedings." 22 U.S.C. § 8772(c). Contrary to Bank Markazi's argument, this provision is expressly *non*-discriminatory.

Finally, Bank Markazi argues that turnover under § 8772 violates Article III.2, which accords Iranian companies "freedom of access to [U.S.] courts," and Article IV.2, which states that Iranian "property shall not be taken except for a public purpose" and upon "prompt payment of just compensation." As discussed below, however, § 8772 neither usurps the adjudicative role of the courts nor effects an unconstitutional taking of Bank Markazi's assets.

In sum, turnover of the blocked assets under § 8772 is entirely consistent with the United States' obligations under the Treaty of Amity. And, assuming *arguendo* that it is not, § 8772 would have to be read to abrogate any inconsistent provisions in the Treaty.

II. Separation of Powers

Bank Markazi next challenges § 8772 as violating the separation of powers between the legislative branch and the judiciary under Article III by compelling the courts to reach a predetermined result in this case. We con-

clude, however, that § 8772 does not usurp the judicial function; rather, it retroactively changes the law applicable in this case, a permissible exercise of legislative authority.

In the leading case to find a separation-of-powers violation, *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), Congress had passed a statute requiring courts to treat pardons of Confederate sympathizers as conclusive evidence of disloyalty, and the Supreme Court found the statute invalid for prescribing a rule of decision to the courts. But while *Klein* illustrates that Congress may not "usurp[] the adjudicative function assigned to the federal courts," later cases have explained that Congress may "chang[e] the law applicable to pending cases," even when the result under the revised law is clear. *Axel Johnson Inc.* v. *Arthur Andersen & Co.*, 6 F.3d 78, 81 (2d Cir. 1993).

In *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992), Congress had passed legislation to resolve two environmental suits challenging logging in the Pacific Northwest. The result of the cases under the new law was clear: the statute stated that "Congress hereby determines and directs" that if the forests at issue were managed under the terms of the new statute, it would "meet[] the statutory requirements that are the basis for" the plaintiffs' environmental law challenges in those particular cases. 503 U.S. at 434–35 (quoting Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 101-121, § 318(b)(6)(A), 103 Stat. 701, 747 (1989)). The Ninth Circuit held this statute to be unconstitutional under *Klein* as directing a particular decision in the two cases. *Id.* at 436. But the Supreme Court rejected this position, concluding instead that "[t]o the extent that [the statute] affected the adjudication of

the cases, it did so by effectively modifying the provisions at issue in those cases," not by compelling findings or results under those provisions. *Id.* at 440.

Our court rejected a similar separation-of-powers challenge to section 27A(a) of the Securities Exchange Act of 1934, which was enacted to preserve pending securities law claims that would otherwise have been dismissed as untimely. *Axel Johnson*, 6 F.3d at 80–82. We noted that, like the statute in *Robertson*, section 27A(a) does not compel findings or results under old law, but rather "constitutes a change in law applicable to a limited class of cases" that "leaves to the courts the task of determining whether a claim falls within the ambit of the statute." *Id.* at 82.

Similarly, § 8772 does not compel judicial findings under old law; rather, it changes the law applicable to this case. And like the statutes at issue in *Robertson* and *Axel Johnson*, § 8772 explicitly leaves the determination of certain facts to the courts:

> [T]he court shall determine whether Iran holds equitable title to, or the beneficial interest in, the assets [at issue] and that no other person possesses a constitutionally protected interest in the assets . under the Fifth Amendment to the Constitution of the United States. To the extent the court determines that a person other than Iran holds—
>
> (A) equitable title to, or a beneficial interest in, the assets (excluding a custodial interest of a foreign securities intermediary or a related intermediary that holds the assets abroad for the benefit of Iran); or
>
> (B) a constitutionally protected interest in the assets

> such assets shall be available only for execution or attachment in aid of execution to the extent of Iran's equitable title or beneficial interest therein and to the extent such execution or attachment does not infringe upon such constitutionally protected interest.

22 U.S.C. § 8772(a)(2).

Bank Markazi argues that while § 8772(a)(2) may formally give discretion to the courts, it effectively compels only one possible outcome, as Iran's beneficial interest in the assets had been established by the time Congress enacted § 8772. But this argument is foreclosed by the Supreme Court's decision in *Robertson*, as the statute there was specifically enacted to resolve two pending cases, and the Supreme Court found no constitutional violation. Indeed, it would be unusual for there to be more than one likely outcome when Congress changes the law for a pending case with a developed factual record.

As we have noted, "[t]he conceptual line between a valid legislative change in law and an invalid legislative act of adjudication is often difficult to draw," *Axel Johnson*, 6 F.3d at 81, and there may be little functional difference between § 8772 and a hypothetical statute directing the courts to find that the assets at issue in this case are subject to attachment under existing law, which might raise more concerns. But we think it is clear that under the Supreme Court's guidance in *Robertson*, § 8772 does not cross the constitutional line.

III. Takings Clause

Bank Markazi's final challenge to § 8772 is that it effects an unconstitutional taking. See U.S. Const., amend. V ("[N]or shall private property be taken for public use, without just compensation."). As we have already stated in a similar case against another Iranian bank, however,

"where the underlying judgment against Iran has not been challenged, seizure of [the bank's] property, as an instrumentality of Iran, in satisfaction of that liability does not constitute a 'taking' under the Takings Clause." *Weinstein*, 609 F.3d at 54.

Bank Markazi argues that this case raises retroactivity concerns that were not present in *Weinstein* because § 8772 was enacted after the assets were first restrained. But this is not a case in which legislation "imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability." *E. Enters.* v. *Apfel*, 524 U.S. 498, 528–29 (1998) (plurality opinion). Iran—the 100% owner of Bank Markazi—had already been found liable to plaintiffs for billions of dollars in uncontested judgments, and § 8772 simply helps plaintiffs reach Iranian assets in partial satisfaction of these judgments. "Here, where Bank [Markazi's] assets are subject to attachment to satisfy a judgment against its foreign sovereign, the underlying purpose of the Takings Clause is in no way violated by attachment of Bank [Markazi's] assets." *Weinstein*, 609 F.3d at 54.

IV. Anti-Suit Injunction

Bank Markazi's final argument on appeal challenges the district court's order that it "shall be permanently restrained and enjoined from instituting or prosecuting any claim or pursuing any actions against Clearstream in any jurisdiction or tribunal arising from or relating to any claim (whether legal or equitable) to the Blocked Assets." *Peterson* v. *Islamic Republic of Iran*, No. 10 Civ. 4518, slip op. at 12 (S.D.N.Y. July 9, 2013), ECF No. 463. Bank Markazi argues that the district court lacked jurisdiction to issue this impermissible restraint on its property outside the United States.

As this court has explained, however, "federal courts . . . have inherent power to protect their own judgments from being undermined or vitiated by vexatious litigation in other jurisdictions." *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 124 (2d Cir. 2007) (emphasis omitted). "The standard of review for the grant of a permanent injunction, including an anti-suit injunction, is abuse of discretion." *Id.* at 118–19. We see no abuse of discretion here, especially as Bank Markazi expressly consented to this language in the district court. At the hearing on this order, Bank Markazi's counsel objected to the anti-suit injunction as overly broad, the district court modified the language in response to this objection, and Bank Markazi's counsel then expressly stated, "That's fine with us as well, your Honor." Transcript of Conference at 24, *Peterson* v. *Islamic Republic of Iran*, No. 10 Civ. 4518 (S.D.N.Y. July 9, 2013), ECF No. 466. Because this issue does not involve jurisdictional concerns, Bank Markazi has no basis to now object to this injunction on appeal. See *Kraebel* v. *N.Y. City Dep't of Hous. Pres. & Dev.*, 959 F.2d 395, 401 (2d Cir. 1992) ("We have repeatedly held that if an argument has not been raised before the district court, we will not consider it.").

CONCLUSION

For the reasons stated above, we AFFIRM the judgment of the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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10 CIV. 4518 (KBF)

DEBORAH D. PETERSON, Personal Representative of the Estate of James C. Knipple (Dec.), *et al.*,
Plaintiffs,

v.

ISLAMIC REPUBLIC OF IRAN, BANK MARKAZI a/k/a CENTRAL BANK OF IRAN; BANCA UBAE SPA; CITIBANK, N.A., and CLEARSTREAM BANKING, S.A.,
Defendants.

ORDER ENTERING PARTIAL FINAL JUDGMENT PURSUANT TO FED R. CIV. P. 54(b), DIRECTING TURNOVER OF THE BLOCKED ASSETS, DISMISSAL OF CITIBANK WITH PREJUDICE AND DISCHARGING CITIBANK FROM LIABILITY

JULY 9, 2013

The Miscellaneous Proceeding

WHEREAS, the plaintiffs in the action captioned *Peterson, et al.* v. *Islamic Republic of Iran, et al.*, Civil Action Nos. 01-cv-2094 and 2684 (D.D.C.) (the "Peterson Judgment Creditors") obtained a default judgment for damages pursuant to 28 U.S.C. § 1605(a)(7) against the

Islamic Republic of Iran ("Iran") and the Iranian Ministry of Information and Security ("MOIS");

WHEREAS, on or about June 13, June 17, and June 24, 2008, the Peterson Judgment Creditors served a writ of execution, a restraining notice and an amended restraining notice on Citibank, N.A. ("Citibank") with respect to 22 debt securities and related cash held by Citibank in an omnibus account for its customer Clearstream Banking, S.A. ("Clearstream") in which Iran was alleged to have an interest (the "Miscellaneous Proceeding");

WHEREAS, the aforementioned debt instruments and securities have varying maturity dates all of which have now matured and been converted to cash;

WHEREAS, on or about June 16, June 23 and October 27, 2008, the Peterson Judgment Creditors served writs and amended writs of execution and restraining and amended restraining notices on Clearstream in New York with respect to the same assets;

WHEREAS, upon consideration of the Order to Show Cause submitted by Citibank with supporting documentation, and following a hearing on June 27, 2008, the Court issued an Order vacating the restraints corresponding to securities ISIN US298785DM51 and ISIN US465410BK38 and upheld the restraints with respect to the remaining assets (the "Restrained Assets");

WHEREAS, the restraints, writs of execution and levies upon Citibank and Clearstream were extended by Court Order through the date of commencement of this action;

The Turnover and Interpleader Proceedings

WHEREAS, on or about June 8, 2010, the Peterson Judgment Creditors commenced this action seeking turnover of the Restrained Assets (the "Turnover Pro-

ceeding"). On or about October 20, 2010, the Peterson Judgment Creditors filed an Amended Complaint naming as defendants Iran, Bank Markazi a/k/a Central Bank of Iran ("Bank Markazi"), Banca UBAE SpA ("UBAE"), Citibank and Clearstream. The Peterson Judgment Creditors filed a Second Amended Complaint on or about December 7, 2011;

WHEREAS, on or about June 27, 2011, the Court consolidated the Miscellaneous Proceeding and the Turnover Proceeding, and authorized Citibank to file and serve third-party interpleader petitions (the "Interpleader Petitions") on all those persons or entities who had served Citibank or Clearstream with writs of execution, lis pendens or other process indicating that they may have an interest in the Restrained Assets. Citibank filed the interpleader action (the "Interpleader Action" which, together with the Miscellaneous Proceeding and the Turnover Proceeding constitute the "Consolidated Proceedings") to provide notice to potential claimants who were not parties to the proceeding, to provide notice to potential claimants to funds targeted for turnover by plaintiffs, and to obtain a discharge from liability in interpleader. On or about May 24, 2012, the Court authorized Citibank to file and serve additional third-party interpleader petitions on additional third-parties similarly situated;

WHEREAS, Citibank is a stakeholder without interest in the ultimate outcome of this dispute and its interest is in resolution of ownership of the funds at issue herein so that it may, when so ordered, ensure that they are appropriately disbursed;

WHEREAS, by Order dated November 28, 2011 the Interpleader Petitions were consolidated with the Turnover Proceeding;

WHEREAS, the judgment creditors and third-party respondents named in the Interpleader Petitions include the following plaintiffs in the following actions: (1) the Peterson Judgment Creditors; (2) *Acosta, et al.* v. *Islamic Republic of Iran, et al.*, 06-cv-0074S (D.D.C.); (3) *Greenbaum* v. *Islamic Republic of Iran, et al.*, 02-cv-0214S-RCL (D.D.C.); (4) *Estate of Michael Heiser* v. *Islamic Republic of Iran et al.*, 00-02329 and 00-cv-2104 (D.D.C.) (the "Heiser Judgment Creditors"); (5) *Jeremy and Dr. Lucille Levin* v. *The Islamic Republic of Iran, et al.*, Civil Action No. 05-cv-2494 (D.D.C.); (6) *Valore* v. *The Islamic Republic of Iran, et al.*, Civil Action No. 15-cv-1273 (D.D.C.); (7) *Beer, et al.* v. *Islamic Republic of Iran, et al.*, Civil Action Nos. 06-cv-473 and 05-cv-I807 (D.D.C.); (8) *Kirschenbaum, et al.* v. *Islamic Republic of Iran, et al.*, Civil Action Nos. 03-cv-1708 and 08-cv-1814 (D.D.C.); (9) *Murphy, et al.* v. *Islamic Republic of Iran, et al.*, Civil Action No. 06-cv-596 (D.D.C.) (the "Murphy Judgment Creditors"); (10) *Rubin* v. *Islamic Republic of Iran, et al.*, Civil Action No. 01-cv-1655 (D.D.C.); (11) *Estate of Anthony K. Brown* v. *Islamic Republic of Iran, et al.*, Civil Action No. 08-cv-531 (D.D.C.); (12) *Estate of Stephen B. Bland* v. *Islamic Republic of Iran, et al.*, Civil Action No. 05-cv-2124 (D.D.C.); (13) *Bonk, et al.* v. *Islamic Republic of Iran, et al.*, Civil Action No. 08-cv-1273 (D.D.C.); (14) *Arnold, et al.* v. *Islamic Republic of Iran, et al.*, Civil Action No. 06-cv-516 (D.D.C.); (15) *Estate of James Silvia, et al.* v. *Islamic Republic of Iran, et al.*, Civil Action No. 06-cv-750 (D.D.C.) (the foregoing judgment creditors numbered (1) through (15) are collectively referred to herein as "Plaintiffs"); (16) *Mwila, et al.* v. *Islamic Republic of Iran, et al.*, Civil Action No. 08-cv-1377 (D.D.C.) (the "Mwila Action"); (17) *Owens, et al.*, v. *Republic of Sudan, et al.*, Civil Action No. 01-cv-2244 (D.D.C.) (the "Owens Action"); and (18) *Khaliq, et al.* v.

Republic of Sudan, et al., Civil Action No. 08-cv-1273 (D.D.C.) (the "Khaliq Action");

WHEREAS, on or about January 13, 2013, judgment creditors of Iran who were plaintiffs in the case captioned *Shahintaj Bakhtiar* v. *Islamic Republic of Iran*, Civil Action No. 02-cv-92 (D.D.C.) moved this Court to intervene in this proceeding and assert a claim to the Blocked Assets. The Bakhtiar Plaintiffs withdrew the motion, and the writ of execution served on Citibank, on January 25, 2013;

WHEREAS, Iran and MOIS were served with the Summons and Complaint and with the Amended and Second Amended Complaint, and Iran with the Interpleader Petition (both in English and Farsi), and that said service constitutes good and sufficient service pursuant to 28 U.S.C. § 1608, but they have not appeared and default was entered against them by this Court;

WHEREAS, on or about February 5, 2012, the President of the United States issued Executive Order 13599, declaring "[a]ll property and interests in property of" Iran or Bank Markazi held in the United States or by a "United States person" "blocked" pursuant to the President's authority under the International Emergency Economic Powers Act. In compliance therewith, Citibank designated the Restrained Assets as "blocked" (hereinafter the "Blocked Assets"), reported the blocking to the United States Treasury Department's Office of Foreign Assets Control ("OFAC") as required by applicable OFAC regulations, and has held the funds in a blocked account in accordance with OFAC regulations;

The Motions and the Court's Decision

WHEREAS, on or about December 22, 2011, Clearstream moved to vacate the writs of execution and re-

straining orders with respect to the Restrained Assets (the "Motion to Vacate Restraints");

WHEREAS, on or about March 15, 2012, Bank Markazi moved to dismiss the Second Amended Complaint;

WHEREAS, on or about April 2, 2012, a Motion for Partial Summary Judgment with respect to the Blocked Assets was filed by and/or on behalf of the Plaintiffs, which sought to enforce turnover of the Blocked Assets pursuant to § 201 of the Terrorism Risk Insurance Act ("TRIA"), codified as a note to 28 U.S.C. § 1610;

WHEREAS, on or about August 10, 2012, President Obama signed into law the Iran Threat Reduction and Syria Human Rights Act of 2012 (the "2012 Act"), 22 U.S.C. § 8701, *et seq.*, § 8772 of which refers explicitly to the Blocked Assets and makes them subject to turnover to the Plaintiffs subject to Court determination of certain issues enumerated therein;

WHEREAS, Plaintiffs supplemented their motion for summary judgment based on the grounds set forth in 22 U.S.C. § 8772;

WHEREAS, on or about December 10, 2012 and December 14, 2012, Clearstream moved to dismiss the turnover claims alleged in the Second Amended Complaint and certain cross-claims by incorporating by reference its Motion to Vacate Restraints, and its prior briefing concerning the supposed lack of personal jurisdiction over it;

WHEREAS, on or about December 21, 2012, UBAE moved to dismiss the Second Amended Complaint based upon the supposed lack of personal jurisdiction over it;

WHEREAS, on or about February 25, 2013, judgment creditors of Iran who were plaintiffs in the case captioned *Wultz* v. *Islamic Republic of Iran*, Civil Action No. 08-cv-

1460 (D.D.C.) moved this Court to intervene in this proceeding and assert a claim to the Blocked Assets, which motion was opposed by Plaintiffs. On May 10, 2013, the Court granted the motion shortly after Plaintiffs and the Wultz plaintiffs had reached a resolution regarding the Wultz plaintiffs' interest in the Restrained Assets;

WHEREAS, on February 28, 2013, the Court issued an Opinion and Order (the "Turnover Order"), denying in their entirety the Motions to Dismiss filed by Clearstream, UBAE and Bank Markazi, and Clearstream's Motion to Vacate Restraints, and granting Plaintiffs' Motion for Partial Summary Judgment in favor of turnover and the Bland judgment creditors' motion for execution;

WHEREAS, Clearstream and UBAE moved for reconsideration of the Turnover Order, which motion was denied by order dated May 20, 2013 (the "Reconsideration Order");

WHEREAS the findings and conclusions of the Turnover Order and the Reconsideration Order, are incorporated in this Partial Judgment by reference and with respect to which this Partial Judgment constitutes the final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure for purposes of an appeal;

WHEREAS, counsel for the plaintiffs in the Owens Action, the Khaliq Action and the Mwila Action filed declarations dated June 26, 2013, informing the Court that none of the plaintiffs in those actions have obtained judgments for damages against Iran and thus have no claim to the Blocked Assets, and consenting to entry of an order vacating the Turnover Order to the extent that it granted partial summary judgment in favor of the plaintiffs in the Owens Action, the Khaliq Action and the Mwila Action and to entry of a final order to the same extent as provided in this Partial Judgment releasing and

discharging Citibank and Clearstream from any obligations to the plaintiffs in those actions pursuant to C.P.L.R. §§ 5209 or 6204 and Rule 22 of the Federal Rules of Civil Procedure as applicable, from any and all liability and obligations or other liabilities of any nature, which relate to the Blocked Assets, to the full extent that any such order also discharges and releases Citibank's obligations and liabilities as to all other parties to this action, and as further provided therein;

WHEREAS, the Plaintiffs have agreed among themselves to settle their competing claims with respect to the Blocked Assets;

WHEREAS, the Court has found that only Bank Markazi has a beneficial interest in the Blocked Assets;

WHEREAS, UBAE has represented to the Court that it claims no legally cognizable interest in or to the Blocked Assets;

WHEREAS, the Court has found that Citibank and Clearstream are neutral stakeholders of the Blocked Assets;

WHEREAS, by Order of this Court dated July 9, 2013, a trust was created for the benefit of the Plaintiffs (the "QSF") for the purpose of, *inter alia*, receiving the turnover of the Blocked Assets; holding the Blocked Assets in accordance with the terms of that Order pending appeal of this Partial Judgment Pursuant to Fed. R. Civ. P. 54(b) (the "Partial Judgment") and the Turnover Order; and distributing the Blocked Assets to the individual Plaintiffs;

WHEREAS, the Restrained and/or Blocked Assets have been maintained at Citibank in segregated and/or blocked accounts;

WHEREAS, Citibank, having commenced third-party proceedings in the nature of interpleader, as described above, pursuant to Rule 22 of the Federal Rules of Civil Procedure and other applicable provisions of law, and having brought before the Court in these proceedings all potential claimants to the Blocked Assets as in accordance with, and pursuant to the Court's June 27, 2011 and May 24, 2012 Orders so that they could assert their claims to the Blocked Assets, is entitled to an order discharging it from any and all liability with respect to any and all claims made by any party with regard to the Blocked Assets, as more fully described below;

WHEREAS, 22 U.S.C. § 8772(a)(2) provides that the Court's determination thereunder to turn over the Blocked Assets to judgment creditors like the Plaintiffs is in furtherance of the broader goals of the 2012 Act, which, as expressed in 22 U.S.C. § 8711, are to sanction Iran in order to compel Iran to abandon efforts to acquire a nuclear weapons capability and other threatening activities by imposing all available sanctions against Iran, including those imposed by the 2012 Act, in a complete, timely, and vigorous manner;

WHEREAS, the vast majority of the more than one thousand individual Plaintiffs suffered serious injuries at the hands of Iran in connection with the terrorist bombing of the U.S. Marine barracks in Beirut, Lebanon on October 23, 1983, and the balance of the Plaintiffs suffered serious injuries a number of years ago in connection with various terrorist attacks sponsored by Iran;

WHEREAS, the issues presented by the remaining claims asserted by only some of the Plaintiffs are based upon fraudulent conveyance and tort theories alleged against defendants Clearstream, Markazi and UBAE only and are related to Markazi's 2008 sales of debt securi-

ties with a face amount of $250 million, and the facts and law relevant to those claims differ from the legal and factual issues presented by Plaintiffs' claims for turnover of the Blocked Assets, as decided by the Court in connection with the Turnover Order; and

WHEREAS, by email dated May 16, 2013 the Office of the Chief Counsel (Foreign Assets Control) of the U.S. Department of the Treasury advised counsel for Citibank and the Peterson Judgment Creditors that OFAC will issue a license (the "License") authorizing the transfer of the Blocked Assets pursuant to 31 C.F.R. 501 on receipt of an order from the Court directing Citibank to turnover the Blocked Assets in accordance with this Order (see ECF No. 404);

For the foregoing reasons, and those set forth in the Turnover Order and the Reconsideration Order,

NOW, THEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. This Court has jurisdiction over the subject matter of this action and the *res*. This Court has personal jurisdiction over Citibank, Clearstream, and Bank Markazi. This Court has not made a final determination as to personal jurisdiction over UBAE with respect to the remaining claims asserted by some of the Plaintiffs against UBAE.

2. Plaintiffs are awarded judgment for turnover of the Blocked Assets.

3. OFAC shall issue the License within fourteen (14) business days after entry of this Order, and such License shall include a License to the Trustee of the QSF and UBS Wealth Management (Americas) Inc. to transfer the Blocked Assets to the Registry of the Court as may be required under paragraph 7 of this Order. Citibank shall,

within fourteen (14) business days of the issuance by OFAC of the License, deposit the Blocked Assets, plus all accrued interest thereon to date, minus any reasonable fees calculated thereon (the amount of which remains subject to Court approval), which as of June 4, 2013 constituted $1,895,600,513.03, in an account opened in the name of the QSF at UBS Wealth Management (Americas) Inc. (the "QSF Account") in accordance with, and under the terms of, the Order approving the formation of the QSF dated July 9, 2013.

4. Until either of the events in paragraphs 5 or 7 of this Order have occurred, the funds shall be held in the QSF Account and shall not be distributed therefrom to any party other than to pay to Citibank such reasonable attorneys' fees as shall be awarded by the Court in accordance with paragraph 17 hereof: to pay fees on the QSF Account, taxes on earnings from the QSF Account, and any fees and expenses payable to the trustee of the QSF as may be approved by further order of the Court.

5. Within thirty days after this Partial Judgment becomes a "Non-Appealable Sustained Judgment" (as defined below), the Plaintiffs shall apply to the Court for an order authorizing the distribution of the funds in the QSF Account in accordance with the terms of the Plaintiffs' agreement concerning the distribution of those funds.

6. This Partial Judgment shall be considered a Non-Appealable Sustained Judgment when the time to file an appeal from the Partial Judgment has expired or, if any appeal is filed and not dismissed, after the Partial Judgment is upheld in all material respects on appeal or after review by writ of certiorari and is no longer subject to review upon appeal or review by writ of certiorari.

7. If this Partial Judgment does not become a Non-Appealable Sustained Judgment because the Partial Judgment is not upheld in all material respects on appeal or after review by writ of certiorari, the Blocked Assets will be transferred to the Registry of the Court upon application for, and receipt of the License from OFAC, and shall not, in any event, be transferred to Citibank.

8. The Court intends that the deposit by Citibank of the Blocked Assets plus interest and minus fees calculated thereon, into the QSF Account in accordance with paragraph 3 hereof, shall constitute a turnover to the Plaintiffs. Nevertheless, to the extent that an appellate court deems the effect of this Partial Judgment or the Turnover Order stayed pending appeal, the Court hereby extends the priority established in favor of the Plaintiffs upon the filing of this Partial Judgment under New York C.P.L.R. § 5234(c) until sixty (60) days after the later of (a) the date this Partial Judgment becomes a Non-Appealable Sustained Judgment, or (b) the filing of an order of the Court directing turnover of the Blocked Assets or any part thereof that is issued on remand from any appeal of this Partial Judgment.

9. Upon deposit by Citibank of the Blocked Assets, plus all accrued interest thereon to date, and minus any reasonable fees calculated thereon, into the QSF Account in accordance with paragraph 3 hereof, Citibank shall be fully discharged pursuant to C.P.L.R. §§ 5209 or 6204 and Rule 22 of the Federal Rules of Civil Procedure as applicable, and released from any and all liability and obligations or other liabilities of any nature, to any person or entity including but not limited to defendant Iran, any agency and instrumentality of Iran, Bank Markazi, Clearstream and UBAE, the Plaintiffs, and any other person or entity, which relate to the Blocked Assets, to

the full extent of such amounts so held and deposited in the QSF Account in compliance with this Partial Judgment.

10. Upon deposit by Citibank of the Blocked Assets, plus all accrued interest thereon to date, and minus any reasonable fees calculated thereon, into the QSF Account in accordance with paragraph 3 hereof, Defendants Iran, Bank Markazi, Clearstream and UBAE, the Plaintiffs and all other persons and entities, shall be permanently restrained and enjoined from instituting or prosecuting any claim, or pursuing any actions against Citibank in any jurisdiction or tribunal arising from or relating to any claim (whether legal or equitable) to the Blocked Assets to the full extent of such amounts so held and turned over to the QSF Account in compliance with paragraph 3 of this Order.

11. Once Citibank deposits the Blocked Assets, plus all accrued interest thereon, and minus any reasonable fees payable thereon, into the QSF Account in accordance with paragraph 3 hereof, Citibank's obligations shall be deemed discharged with respect to the Blocked Assets only under all writs of execution, notices of pending action, restraining notices and other judgment creditor process of any kind, whether served on, or delivered to Citibank, to the extent that they apply, purport to apply or attach only to the Blocked Assets (Citibank's obligations shall continue with respect to such writs of execution, notices of pending action, restraining notices and other judgment creditor process with respect to any assets other than the Blocked Assets as provided by applicable law); provided, however, that such writs of execution, notices of pending action, restraining notices or other creditor process served on behalf of any of the Plaintiffs shall continue as a lien on assets of Markazi, MOIS,

and/or Iran or any of its agencies and instrumentalities, as provided by applicable law.

12. Upon the issuance of an order authorizing the distribution of the funds in the QSF Account in accordance with paragraph 5 hereof, and provided that Clearstream does not interfere with the implementation and execution of such order in any way (including but not limited to motions or appeals directed at such order), Clearstream shall be fully discharged pursuant to C.P.L.R. §§ 5209 or 6204 and Rule 22 of the Federal Rules of Civil Procedures as applicable, and released from any and all liability and obligations or other liabilities of any nature, to any person or entity, including but not limited to defendant Iran, any agency or instrumentality of Iran, Bank Markazi, UBAE, the Plaintiffs, and any other person or entity, which relate to the Blocked Assets, to the full extent of such amounts deposited by Citibank in the QSF Account in compliance with this Partial Judgment.

13. Upon the issuance of an order authorizing the distribution of the funds in the QSF Account in accordance with paragraph 5 hereof, and provided Clearstream does not interfere with the implementation and execution of such order in any way (including but not limited to motions or appeals directed at such order), Defendants Iran, Bank Markazi and UBAE, the Plaintiffs and all other persons and entities shall be permanently restrained and enjoined from instituting or prosecuting any claim or pursuing any actions against Clearstream in any jurisdiction or tribunal arising from or relating to any claim (whether legal or equitable) to the Blocked Assets to the full extent of those funds that are being deposited by Citibank in compliance with this Partial Judgment.

14. Within fourteen (14) business days after this Partial Judgment becomes a Non-Appealable Sustained

Judgment and the issuance of a payment to the Heiser Judgment Creditors in accordance with paragraph 5 hereof, the Heiser Judgment Creditors shall file a stipulation of voluntary partial dismissal with prejudice with respect to Citibank and the Blocked Assets only in the form attached to this Partial Judgment as Exhibit A in the following actions: *Estate of Michael Heiser, et al.* v. *Clearstream Banking, S.A.*, Case No. 11 Civ. 1597 (S.D.N.Y.), *Estate of Michael Heiser, et al.* v. *Citibank, N.A.*, Case No. 11-cv-1698 (RPB) (S.D.N.Y.) and *Estate of Michael Heiser, et al.* v. *JPMorgan Chase Bank, N.A., et al.*, Case No. 11-cv-2570 (LBS) (S.D.N.Y.).

15. Within fourteen (14) business days after Citibank deposits the Blocked Assets, plus all interest accrued thereon, and minus any reasonable fees payable thereon, into the QSF Account in accordance with paragraph 3 hereof, the Murphy Judgment Creditors shall file a stipulation of voluntary dismissal with prejudice with respect to the remaining claims asserted in their pleadings against Citibank that have not been adjudicated by this Partial Judgment, in the form attached to this Partial Judgment as Exhibit B.

16. Citibank shall be entitled to apply for its reasonable costs and attorneys' fees in connection with these proceedings and the parties reserve their right to object to such application. Notwithstanding Fed. R. Civ. P. 54(d)(2)(B), Citibank shall be entitled to submit its motion or application for attorney's fees and costs at any time until fourteen (14) days after this Partial Judgment and the Turnover Order shall be considered a Non-Appealable Sustained Judgment.

17. Upon the later of: (a) fourteen (14) business days from the date on which the Court approves any award in respect of Citibank's reasonable costs and attorneys'

fees; or (b) fourteen business days after this Partial Judgment becomes a Non-Appealable Sustained Judgment, the QSF shall pay Citibank any amount of attorneys' fees and costs awarded by the Court from the QSF Account. The payment of those fees and expenses from the QSF Account shall not prejudice the right of any party to pursue an appeal of any decision reached by the Court with respect to the payment of Citibank's fees and expenses.

18. This Partial Judgment, which incorporates the Turnover Order and the Reconsideration Order, constitutes a final judgment within the meaning of Federal Rule of Civil Procedure 54(b), and there is no just reason for delay of the entry of judgment as provided herein.

19. The Turnover Order is hereby vacated only to the extent that it granted partial summary judgment in favor of the plaintiffs in the Owens Action, the Khaliq Action and the Mwila Action.

20. Among other reasons, the Court concludes that entry of a final judgment pursuant to Rule 54(b) is appropriate because: (a) the factual and legal issues raised by the remainder of the claims that Plaintiffs have alleged are substantially different from the factual and legal issues presented by the claims under TRIA and 22 U.S.C. § 8772 adjudicated in connection with the Turnover Order regarding Plaintiffs' motion for partial summary judgment; (b) the Plaintiffs in this action are victims of terrorism who have been waiting for some compensation for their losses for many years, and most Plaintiffs are victims of the 1983 attack on the Marine Barracks in Beirut, Lebanon; (c) the Court credits the representations of Plaintiffs' counsel that many of the Plaintiffs are elderly and many others have passed away since the terrorist attacks that underlie this matter, and

further delay in payment to the Plaintiffs will result in many victims of the relevant terrorist attacks receiving no compensation at all for their losses; (d) the Court credits the representations of Plaintiffs' counsel that many of the Plaintiffs face difficult financial circumstances and have a significant need for the funds owed to them in connection with this action; (e) several groups of creditor plaintiffs are not asserting any claims that remain to be adjudicated in this matter, so this Partial Judgment resolves all matters relevant to those Plaintiffs; and (f) the goal of Congress to compel Iran to abandon efforts to acquire a nuclear weapons capability and other threatening activities by timely and vigorous imposition of sanctions on Iran under the 2012 Act is furthered by the finality of any determination by this Court to turn over the Blocked Assets to the Plaintiffs in accordance with 28 U.S.C. § 8772.

21. Upon deposit by Citibank of the Blocked Assets, plus all interest accrued thereon, and minus any reasonable fees into the QSF Account in accordance with paragraph 3 hereof, Citibank shall be deemed to have satisfied all duties and responsibilities of an interpleader Stakeholder in these Consolidated Proceedings. Citibank shall have no continuing or further obligations with respect to those assets, and all claims, counterclaims and cross-claims that were or could have been asserted against Citibank in this action by any party herein relating to the Blocked Assets (to the full extent of such amounts so held and turned over to the QSF Account in compliance with Paragraph 3 of this Order) shall be dismissed with prejudice. There being no additional claims asserted against Citibank in this action, upon deposit of the Blocked Assets, plus interest and minus reasonable fees payable thereon, into the QSF Account in accord-

ance with Paragraph 3 hereof, it shall be dismissed as a party from this action; provided however, that if, notwithstanding paragraph 7 of this Order, the Blocked Assets are returned to Citibank pending proceedings on remand after any appeal of this Partial Judgment, Citibank may again be joined in this action by order of the court and the dismissal, discharge and release contained in this Partial Judgment shall be deemed null and void.

22. This Court shall retain jurisdiction over this matter to adjudicate the remaining claims asserted by the Plaintiffs against Clearstream, Markazi and UBAE, and all funds deposited into the QSF Account shall remain subject to the Court's jurisdiction until they are distributed in accordance with the terms of this Partial Judgment.

SO ORDERED.

Dated: New York, New York
July 9, 2013

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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10 Civ. 4518 (KBF)

DEBORAH D. PETERSON, Personal Representative of the Estate of James C. Knipple (Dec.), et al.,
Plaintiffs,

v.

ISLAMIC REPUBLIC OF IRAN, et al.,
Defendants.

MEMORANDUM DECISION & ORDER

MAY 20, 2013

KATHERINE B. FORREST, District Judge:

Defendants Clearstream Banking, S.A., and Banca UBAE, S.p.A. have moved for reconsideration of the Court's Opinion and Order of February 28, 2013 ("February 28 Opinion"), unsealed on March 13, 2013. *Peterson* v. *Islamic Republic of Iran*, 10 CIV 4518 (KBF), 2013 WL 1155576 (S.D.N.Y. Mar. 13, 2013). The February 28 Opinion, *inter alia*, denied defendants' motions to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2) and granted plaintiffs' motion for partial summary judgment—finding that approximately $1.75 billion in cash frozen in an account at Citibank (the "Blocked Assets") is subject to turnover to plaintiffs pur-

suant to 22 U.S.C. § 8772, the Terrorism Risk Insurance Act ("TRIA"), and the Foreign Sovereign Immunities Act ("FSIA"). The February 28 Opinion did not address plaintiffs' remaining common-law causes of action for fraudulent conveyance, tortious interference with collection of a money judgment, and prima facie tort—all of which relate to defendants' transfer of bonds with a face value of $250 million (the "$250 Million Bonds") out of the United States.

While defendants challenge distinct aspects of the February 28 Opinion—Clearstream asks for reversal of the partial summary judgment and UBAE protests the denial of its 12(b)(2) motion—both defendants' arguments depend upon a single premise: that the Court did not adequately consider the policy and statutory preferences favoring the free functioning of intermediaries in global financial markets. Such freedom, defendants argue, dictates that cash bond proceeds held in correspondent accounts at U.S. banks on behalf of foreign banks cannot subject the foreign banks to jurisdiction in New York courts, nor can the proceeds be attached by judgment creditors of the foreign banks' clients.

As a general matter, of course, well-functioning markets are important. The Court's February 28 Opinion in no way, however, impedes such functioning. Movants are wrong to argue that this economic principle may act as a shield to override the clear intent of Congress that the Blocked Assets are subject to execution and that the parties are subject to this Court's jurisdiction. Therefore, and for the reasons set forth below, both motions for reconsideration are DENIED.

I. STANDARD OF REVIEW

Clearstream and UBAE seek reconsideration of the Court's February 28 Opinion pursuant to Local Rule 6.3

and Fed. RR. Civ. P 59(e) and 52(b). The identical standard of review governs all three rules. *R.F.M.A.S., Inc.* v. *Mimi So*, 640 F. Supp. 2d 506, 509 (S.D.N.Y. 2009) (standard identical for Rule 59(e) and Local Rule 6.3); *Sank* v. *City Univ. of New York*, 2003 WL 21403682 (S.D.N.Y. June 19, 2003) (same standard for 52(b), which requests revised findings of fact, and Local Rule 6.3).

Under these rules, the movant must show that the Court overlooked "controlling decisions or factual matters" that had been previously put before it. *R.F.M.A.S., Inc.*, 640 F Supp. 2d at 509 (discussion in the context of both Local Civil Rule 6.3 and Fed. R. Civ. P 59(e)); see also *Padilla* v. *Maersk Line, Ltd.*, 636 F. Supp. 2d 256, 258-59 (S.D.N.Y. 2009). "Such motions must be narrowly construed and strictly applied in order to discourage litigants from making repetitive arguments on issues that have been thoroughly considered by the court." *Range Road Music, Inc.* v. *Music Sales Corp.*, 90 F Supp. 2d 390, 391-92 (S.D.N.Y. 2000); see also *SimplexGrinnell LP* v. *Integrated Sys. & Power, Inc.*, 642 F Supp. 2d 206 (S.D.N.Y. 2009) ("A motion for reconsideration is not an invitation to parties to 'treat the court's initial decision as the opening of a dialogue to advance new theories or adduce new evidence in response to the court's ruling.'") (internal quotation and citations omitted); *United States* v. *Local 1804-1, Int'l Longshoreman's Ass'n*, 831 F. Supp. 167, 169 (S.D.N.Y. 1993) (Rule 52(b) motions should be granted where necessary to correct "manifest errors of law or fact," but they cannot be used to "relitigate old issues, to advance new theories, or to secure a rehearing on the merits").

II. ANALYSIS AS TO CLEARSTREAM

Clearstream challenges the entry of partial summary judgment in favor of plaintiffs and several factual state-

ments in the February 28 Opinion. It does not ask the Court to reconsider the denial of its Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction.

a. Partial Summary Judgment

Clearstream suggests the Court committed "clear error" in finding that the $1.75 billion in cash held at Citibank is beneficially owned by defendant Bank Markazi (the central bank of Iran) and thus subject to execution and turnover to plaintiffs. However, Clearstream does not point to "manifest errors of law or fact" justifying reconsideration. See *Local 1804-1, Int'l Longshoreman's Ass'n*, 831 F. Supp. at 169.

Clearstream seeks to relitigate issues the Court fully considered and rejected in its February 28 Opinion. As such, the Court will not devote additional analysis to Clearstream's arguments that it has "consistently asserted" property rights in the $1.75 billion in cash (Clearstream Recon. Br. at 6-7)[1] or that awarding those assets to plaintiffs would constitute an unconstitutional taking

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[1] Clearstream suggests the Court overlooked its "consistent" assertion of rights as a beneficial owner of the $1.75 billion. However, it cites only three instances—all in legal argument rather than evidence of an admissible character—in which Clearstream mentioned an interest in the assets. Plaintiffs rightly point out that, more often, Clearstream has exhaustively disclaimed ownership of the Blocked Assets. (See PIs.' Recon. Br. at 4 (noting Clearstream's statements in briefs that it "does not acquire any proprietary rights in the securities entitlements in Bank Markazi's account", that it acts "not for its own financial interests but on behalf of its customers", and that the Blocked Assets "are held ultimately for the benefit of Bank Markazi"). Further, the Court's February 28 Opinion recited Bank Markazi's consistent position—uncontested by Clearstream—that it is the sole owner of the assets. See *Peterson*, 2013 WL 1155576, at *23 n.10.

(*Id.* at 10; Clearstream Reply Br. at 1, 4).[2]

Nor is Clearstream's statutory argument meritorious. Clearstream suggests the Court committed clear error in its interpretation of a key statute—22 U.S.C. § 8772—by which it concluded that Bank Markazi is the sole beneficial owner of the Blocked Assets. Clearstream argues that § 8772 does not preempt—but rather must incorporate—the definitions of ownership supplied by Article 8 of the Uniform Commercial Code, as adopted by New York law. See N.Y. U.C.C. L. Art. 8. By the U.C.C. definition, Clearstream suggests, it is the only party with an ownership interest in the Blocked Assets held at Citibank in New York.

Even assuming that such an argument is proper on a motion for reconsideration,[3] however, it must be rejected on at least two grounds. First, Clearstream's reading of § 8772 is erroneous. Section 8772(a) reads, in relevant part, as follows:

> (1) In general: Subject to paragraph (2), notwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law, a financial asset that is—

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[2] The Court addressed the takings arguments in its February 28 Opinion. See *Peterson*, 2013 WL 1155576, at *31-*33.

[3] Clearstream argued at length in its briefing on its motion to vacate the restraints on the Blocked Assets and in opposition to plaintiffs' partial summary judgment motion that § 8772 did not preempt the U.C.C. It did not, however, make the precise statutory interpretation argument it is making here—that § 8772 explicitly incorporates the U.C.C. definition of ownership. While it is improper for a party to raise new arguments for the first time on reconsideration, see, *e.g.*, *SimplexGrinnell*, 642 F. Supp. 2d at 209-210, in the interests of a full record the Court will address this new application of Clearstream's otherwise well-worn U.C.C. argument.

(A) held in the United States for a foreign securities intermediary doing business in the United States;

(B) a blocked asset (whether or not subsequently unblocked) that is property described in subsection (b); and

(C) equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran or any agency or instrumentality of that Government, that such foreign securities intermediary or a related intermediary holds abroad,

shall be subject to execution or attachment in aid of execution in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, or hostage-taking, or the provision of material support or resources for such an act.

(2) Court determination required: In order to ensure that Iran is held accountable for paying the judgments described in paragraph (1) and in furtherance of the broader goals of this Act to sanction Iran, prior to an award turning over any asset pursuant to execution or attachment in aid of execution with respect to any judgments against Iran described in paragraph (1), the court shall determine whether Iran holds equitable title to, or the beneficial interest in, the assets described in subsection (b) and that no other person possesses a constitutionally protected interest in the assets described in subsection (b) under the Fifth Amendment to the Constitution of the United States. To the extent

> the court determines that a person other than Iran holds—
>
> > (A) equitable title to, or a beneficial interest in, the assets described in subsection (b) (excluding a custodial interest of a foreign securities intermediary or a related intermediary that holds the assets abroad for the benefit of Iran); or
> >
> > (B) a constitutionally protected interest in the assets described in subsection (b), such assets shall be available only for execution or attachment in aid of execution to the extent of Iran's equitable title or beneficial interest therein and to the extent such execution or attachment does not infringe upon such constitutionally protected interest.

22 U.S.C. § 8772(a).

In its February 28 Opinion, the Court held that § 8772 preempts any state law (including the U.C.C.) that would purport to confer an ownership interest on Clearstream. The primary basis for the Court's holding was § 8772's statement that it applies "notwithstanding any other provision of law, and preempting any inconsistent provision of State law." 22 U.S.C. § 8772(a)(1).

Clearstream argues that the Court's interpretation is erroneous. It first suggests that the Court overlooked that the "notwithstanding" clause of § 8772(a)(1), which preempts conflicting state law, is made expressly "subject to paragraph (2)". The paragraph two (§ 8772(a)(2)) analysis must therefore occur before the Court preempts any conflicting portion of state law under paragraph one. The paragraph two analysis requires the Court to determine whether a person other than Iran holds "equitable title to," a "beneficial interest in", or a "constitutionally

protected interest" in the assets it determines are "Blocked Assets" Clearstream argues that because § 8772 lacks definitions of equitable title, beneficial interest, and constitutional interest, the Court must apply the presumption that state law—here, U.C.C. Art. 8—supplies the definitions of ownership where federal law is silent. Clearstream further argues this conclusion is strengthened by § 8772(c), which states, "[n]othing in this section shall be construed to preempt State law, including the Uniform Commercial Code, except as expressly provided in subsection (a)(1)." 22 U.S.C. § 8772(c) (emphasis added). Thus, according to Clearstream, the Court must look to Article 8 of the U.C.C. and conclude that Clearstream has an ownership interest in the Blocked Assets.

The Court disagrees with Clearstream's statutory interpretation. Instead, the following syllogism holds: first, § 8772(a)(1) specifically preempts state law that would be inconsistent with execution against a Blocked Asset. Next, the Court determined that the $1.75 billion in cash here is, in fact, a Blocked Asset for the purposes of § 8772(a)(1). It did so, in part, by recognizing that a Blocked Asset includes a "custodial interest of a foreign securities intermediary or a related intermediary that holds the assets abroad for the benefit of Iran." 22 U.S.C. § 8772(a)(2)(A). The Court found Clearstream to be such a related intermediary. Congress thus intended (by enacting § 8772(a)(1)): (1) that assets held by an intermediary such as Clearstream are Blocked Assets and (2) to preempt any provision of state law that would prevent the execution on those assets. Therefore, the only reading of paragraph two (§ 8772(a)(2)) consistent with Congressional intent is one in which an intermediary such as Clearstream has no beneficial, constitutional, and

equitable ownership in the Blocked Assets. By elimination, the only party that could have an ownership interest in those Blocked Assets is Bank Markazi. No resort to state law is necessary or permitted. Nor is the statement in § 8772(c) that "[n]othing in this section shall be construed . . to preempt State law, including the Uniform Commercial Code" of any moment; that subsection is inapplicable where, as here, such preemption is "expressly provided in subsection (a)(1)"

Even if Clearstream is correct that § 8772 incorporates state law definitions of ownership, however, those definitions support the Court's grant of partial summary judgment. Clearstream argues that Article 8 of the UCC—which deals with Investment Securities—would apply to the Blocked Assets under state law. That assumption is incorrect. The Blocked Assets have now been entirely redeemed and converted to cash; the bonds are no more. Section 8-112 of the UCC—on which Clearstream relies—only "govern[s] the extent to which and the means by which any interest in a certificated security, uncertificated security or security entitlement . may be reached." N.Y. C.P.L.R. § 5201(c)(4) (emphasis added). Cash held by someone other than the judgment debtor is subject to turnover under N.Y. C.P.L.R. § 5225(b); U.C.C. § 8-112 is inapplicable. Clearstream is thus a mere "garnishee" under New York law and has no property right in the Blocked Assets, even assuming that § 8772 incorporates state law.[4] In the absence of the fed-

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[4] The Court has also rejected Clearstream's argument that, as the named account holder at Citibank, a judgment creditor could attach only Clearstream's judgment debts and not those of Bank Markazi. Bank Markazi cannot hide behind the Clearstream veil where only Bank Markazi has an ownership interest in the funds in the account at Citibank. To hold otherwise would permit a terrorist state judg-

eral blocking regimes that froze the account at Citibank, Clearstream would have been obligated to transfer the Blocked Assets to their one true owner—Bank Markazi. See N.Y. U.C.C. L. § 8-505 (McKinney's 2013). The Court thus finds no "manifest errors of law or fact" to reconsider the grant of plaintiffs' motion for partial summary judgment or to deny Clearstream's motion to vacate the restraints on the Blocked Assets.

b. Factual Statements

In addition to its legal arguments on reconsideration, Clearstream asks the Court to vacate certain factual findings stated in the February 28 Opinion. Most of the statements to which Clearstream objects were not factual findings. Rather, they were merely findings that plaintiffs' complaint made plausible allegations (as required to pass the motion to dismiss stage);[5] the Court will not revisit those statements. The Court has reviewed the remainder of the alleged factual errors and concludes that none is material to the outcome of the motions resolved by the February 28 Order.

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ment debtor to avail itself of the benefits of the New York banking system without bearing any legal risk whatsoever.

[5] Clearstream challenges the following passages from the February 28 Opinion: (1) "Plaintiffs have sufficiently alleged, and the facts of the record support, that Bank Markazi and Clearstream were aware of Plaintiffs' judgments at the time that UBAE was engaged to open an account and engage in a sale transaction on behalf of Bank Markazi." *Peterson*, 2013 WL 1155576, at *17. (2) "Clearstream allegedly instructed Citibank to make an electronic funds transfer ("EFT") of the cash from Citibank to UBAE's correspondent bank in New York, HSBC." *Id.* at *4. (See also Clearstream Recon. Br. at 12.) As the February 28 Opinion indicated, the above statements evaluated the sufficiency of plaintiffs' pleading for the purposes of the motion to dismiss; the Court did not rely upon these statements in granting plaintiffs' motion for partial summary judgment or denying the Clearstream motion to vacate the restraints.

III. ANALYSIS AS TO UBAE

UBAE challenges the Court's denial of its motion to dismiss for lack of personal jurisdiction. It also asks that certain factual statements in the February 28 Order be vacated. Neither challenge merits reconsideration.

a. Personal Jurisdiction

In its February 28 Order, the Court held that UBAE is subject to specific personal jurisdiction under either the New York long-arm statute, N.Y. C.P.L.R. § 302(a)(1), or the federal question long-arm statute, Fed. R. Civ. P 4(k)(2). UBAE argues that the Court committed manifest errors of law and fact insofar as it (1) applied an incorrect standard of review on a 12(b)(2) motion and concluded that (2) UBAE transacted business in New York under C.P.L.R. § 302(a)(1); (3) UBAE purposefully availed itself of New York law; (4) UBAE's New York contacts are closely related enough to this litigation to support the due process requirements of specific personal jurisdiction; and (5) Rule 4(k)(2) supports personal jurisdiction as to the causes of action regarding the $250 Million Bonds. The Court finds no manifest error.

i. Standard of Proof

UBAE first misstates plaintiffs' burden of proof on a pre-discovery Rule 12(b)(2) motion, suggesting that declarations from its corporate representative, Biagio Mattranga, are sufficient to defeat jurisdiction. This ignores the precedent in this Circuit that, where no discovery has yet occurred, plaintiffs need only make out a prima facie case of personal jurisdiction; they are not required to prove personal jurisdiction by a preponderance of the evidence. See *Ball* v. *Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990) ("prior to discovery, a plaintiff challenged by a jurisdiction testing motion may

defeat the motion by pleading in good faith . legally sufficient allegations of jurisdiction. At that preliminary stage, the plaintiff's prima facie showing may be established solely by allegations.")

For the purposes of a pre-discovery 12(b)(2) motion, "[t]he allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits." *Seetransport Wiking Trader Schiffarhtsgellschaft MBH & Co., Kommanditgesellschaft* v. *Navimpex Centrala Navala*, 989 F.2d 572, 580 (2d Cir. 1993). Plaintiff must submit affidavits to counter conflicts with defendants' affidavits; any such conflicts are then resolved in plaintiffs' favor, "and the plaintiffs' prima facie showing is sufficient notwithstanding the contrary presentation by the moving party." *Id.*

Here, while discovery has occurred with respect to plaintiffs' turnover cause of action, discovery was stayed as to the $250 Million Bonds causes of action until March 18, 2013 (ECF No. 372)—after the Court issued its February 28 Opinion. Plaintiffs therefore need only raise a prima facie case of personal jurisdiction with respect to the $250 Million Bonds causes of action. In addition, the Court found in its February 28 Opinion that the evidence plaintiffs submitted as to UBAE (even in the absence of a complete discovery record) is sufficient to require UBAE to appear in this action. UBAE's argument as regards plaintiffs' standard of proof is meritless.

ii. Transacting Business Jurisdiction

As the Court concluded in its February 28 Opinion, plaintiffs make out a prima facie case of "transacting business" jurisdiction under N.Y. C.P.L.R. § 302(a)(1)

with respect to UBAE.[6] UBAE challenges three aspects of the Court's conclusion—that UBAE did not transact business in New York, that it lacked purposeful availment of New York law,[7] and that the contacts with New York were not sufficiently related to this litigation.

UBAE first challenges purposeful availment and relatedness based on the geographical location of the bonds here at issue. The February 28 Opinion cited the fact that the UBAE/Markazi bonds held by Clearstream Luxembourg were physically located in New York as key evidence of purposeful availment and relatedness. See *Peterson*, 2013 WL 1155576, at *16. UBAE argues that its purchase of the bonds occurred after they were already custodized in New York, so its availment of New York is accidental, not purposeful. It cites a case in which a manufacturer of allegedly patent-infringing coffeemakers defeated a personal jurisdiction motion where

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[6] To establish that jurisdiction, plaintiffs must make out a prima facie case that UBAE "in person or through an agent," "transacts any business within the state or contracts anywhere to supply goods or services in the state," and that those transactions—also known as "minimum contacts"—relate to the conduct at issue. N.Y. C.P.L.R. § 302(a)(1). In addition, to satisfy due process, plaintiffs must demonstrate that UBAE's conduct indicates "purposeful availment" of the New York forum. See *Licci ex rel. Licci* v. *Lebanese Canadian Bank, SAL* ("*Licci I*"), 673 F.3d 50, 60 (2d Cir. 2012) certified question accepted *sub nom. Licci* v. *Lebanese Canadian Bank*, 18 N.Y.3d 952 (2012) and certified question answered *sub nom. Licci* v. *Lebanese Canadian Bank* ("*Licci II*"), 20 N.Y.3d 327 (2012).

[7] Such purposeful availment is necessary to satisfy the due process requirements of § 302(a)(1). See *CutCo Indus., Inc.* v. *Naughton*, 806 F.2d 361, 365 (2d Cir. 1986) (Section 302(a)(1) "transaction of business" requires showing that non-domiciliary "purposefully avails [itself] of the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws ") (quotation omitted).

the infringing products were transferred into New York by a third party, over whom the defendant lacked control. See *Wing Sing Prods. (BVI) Ltd.* v. *Simatelex Manufactory Co., Ltd.*, 479 F. Supp. 2d 388, 398 (S.D.N.Y. 2007).

The Court rejects this comparison; UBAE stands in a much different position than the defendants in *Wing Sing Products*. The location of the bonds here did not change during the relevant period; rather, UBAE knew (or should have known) that the bonds were custodized in New York when it agreed to purchase them from Bank Markazi. Once it executed that purchase, UBAE had availed itself of the New York forum.

UBAE next argues that the Court erred in finding that its use of a correspondent bank account at HSBC in New York constituted "transacting business" in New York and satisfied the purposeful availment and relatedness requirements for specific jurisdiction. The Court cannot agree.

The February 28 Opinion found that the allegations in plaintiffs' complaint, combined with evidence it submitted via an affidavit of counsel, demonstrated transaction of business, relatedness and purposeful availment. Among these, plaintiffs presented UBAE's own sales records indicating that UBAE distributed sales proceeds and interest payments to Bank Markazi from the very $250 Million Bonds at issue in the common law claims, via the correspondent account at HSBC. (See Decl. of Liviu Vogel in Opp. to UBAE Mot. to Dismiss ("Vogel UBAE MTD Decl.") Exs. C-F.) UBAE contests this pathway of proceeds, suggesting that the interest payments were withdrawn from its Clearstream account and paid to its own accounts in Rome, rather than to Bank Markazi. (See UBAE Reconsid. Br. at 9.) It argues that in *Licci II*—a case the Court relied upon heavily for its denial of

UBAE's 12(b)(2) motion—such direct payments were key evidence that a party "transacted business" in New York. Assuming UBAE is correct as to the law,[8] its factual dispute is of no moment. Where, as here, the parties present conflicting affidavits regarding personal jurisdiction, the Court must draw the factual inferences in favor of plaintiffs. See *Seetransport Wiking Trader Schiffarhtsgellschaft MBH & Co.*, 989 F.2d at 580. For the purposes of personal jurisdiction, then, the alleged use of the HSBC account is sufficient to satisfy the prima facie case.

Further, plaintiffs also sufficiently allege that UBAE caused its agent—Clearstream—to transact business in New York. UBAE argues the Court overlooked the agency law requirement that a principal exercise control over its agent. See, *e.g.*, *CutCo Indus., Inc.* v. *Naughton*, 806 F. Supp. 2d 361, 366 (S.D.N.Y. 2008). The Court did not overlook this principle. In fact, UBAE concedes that it caused Clearstream to effectuate the sale of the $250 Million Bonds—the very assets at issue in this suit. *Peterson*, 2013 WL 1155576, at *3 (citing Matranga Reply Decl. ¶ 7.) Plaintiffs allege that Clearstream then transferred the proceeds to Clearstream's correspondent ac-

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[8] The Court doubts this legal conclusion but will await fuller briefing of the issue as relates to the $250 Million Bonds causes of action. Whether UBAE transferred the interest payments directly to Markazi in the United States, or first expatriated those funds to Rome before crediting the Markazi account does not seem jurisdictionally significant. The alleged conduct remains part of the same transaction, for the benefit of the same defendant, initiated (if not completed) in the United States. The key factor supporting jurisdiction in *Licci II*—clearly met in this case—is that the "defendant's use of a correspondent bank account in New York, even if no other contacts between the defendant and New York can be established was purposeful." *Licci II*, 20 N.Y.3d at 338 (quoting *Licci I*, 673 F.3d at 66).

count at JP Morgan Chase—also in New York—then on to UBAE's account at HSBC. *Id.* HSBC allegedly followed Clearstream's order (on behalf of UBAE and Bank Markazi) to transfer the proceeds to UBAE in Rome. *Id.* These activities alone would satisfy the purposeful availment and relatedness requirements.[9] However, the SAC makes further allegations that further substantiate control by UBAE over Clearstream—namely that UBAE indicated where interest and sales payments should be made and which bonds to hold or sell. (See, *e.g.*, SAC ¶¶ 117, 167-68, 171, 213-215.)

UBAE's final challenge relates to the Second Circuit's recent opinion in *In re Terrorist Attacks on Sept. 11, 2001* (*"Terrorist Attacks VII"*), No. 11-3294, et al., 2013 WL 1590255 (2d Cir. Apr. 16, 2013). Subsequent to its briefing on the instant motion, UBAE filed a notice of supplemental authority regarding *Terrorist Attacks VII*, arguing that the case compels the Court to revisit its personal jurisdiction holding. This Court rejected similar arguments in the February 28 Opinion and finds *Terrorist Attacks VII* inapposite.

First, *Terrorist Attacks VII* speaks most directly about general jurisdiction, not specific jurisdiction. The Second Circuit held that the mere use of a correspondent back account and the maintenance of a website that allows account holders to manage their accounts was insuf-

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[9] UBAE suggests that plaintiffs' declaration in opposition to the 12(b)(2) motion constituted an improper attempt to amend its complaint that the Court should have ignored. This is not the case. As outlined above, in considering a personal jurisdiction motion the Court must look to the allegations made by plaintiffs' complaint and, where defendants submit conflicting affidavits, to plaintiffs' affidavits as well. See *Seetransport Wiking Trader Schiffarhtsgellschaft MBH & Co.*, 989 F.2d at 580.

ficient to support general jurisdiction. *Id.*, at *16. The Circuit reiterated the longstanding view of the federal courts that the contacts giving rise to general jurisdiction must feature many continuous contacts and a degree of permanence; the mere existence of a correspondent account (that may not be in use) does not meet that threshold. *Id.*

The *Terrorist Attacks VII* court specifically exempted specific jurisdiction from its holding with respect to correspondent bank accounts. It distinguished—without disapproving—*Licci II*, which held that the use of correspondent accounts could sometimes constitute a "transaction" of business that satisfied § 301(a)(2) jurisdiction. The Court's February 28 Opinion made specific findings that plaintiffs allege sufficient use of the U.S. correspondent accounts by UBAE to give rise to personal jurisdiction here. See *Peterson*, 2013 WL 1155576, at *16-*17.

Nor do the general statements in *Terrorist Attacks VII* regarding purposeful availment suggest the February 28 Opinion was in error. In *Terrorist Attacks VII*, the Second Circuit reiterated the well-established rule that a defendant must have "purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities." *Terrorist Attacks VII*, 2013 WL 1590255, at *10 (quotations omitted). UBAE suggests no purposeful direction occurred here.

As analyzed above and in the February 28 Opinion, however, the activities allegedly conducted by UBAE were clearly directed at the New York forum: UBAE admits it transferred assets through its correspondent accounts at New York banks. It caused its agent, Clearstream, to engage in substantial commercial activity in New York, related to the bonds here at issue. Plaintiffs

allege UBAE did so in full knowledge that Bank Markazi intended to evade U.S. sanctions by employing UBAE as a go-between. This alleged knowledge distinguishes UBAE from the parties over which the *Terrorist Attacks VII* court refused to exercise jurisdiction. Finally, UBAE is alleged to have aided Markazi in transferring the $250 Million Bonds out of the United States, again using U.S. based bank accounts and financial institutions to do so.[10] All of these activities—many of which UBAE admits occurred—constitute purposeful availment.

iii. 4(k)(2) Jurisdiction

The February 28 Opinion found that, in addition to § 302(a)(1) specific jurisdiction, Fed. R. Civ. P. 4(k)(2) provides an equally viable basis to exercise jurisdiction over UBAE. The parties did not brief Rule 4(k)(2) as a possible basis for personal jurisdiction on UBAE's original 12(b)(2) motion; in the interests of a full hearing, the Court will thus consider UBAE's 4(k)(2) arguments here. On reconsideration, UBAE argues that Rule 4(k)(2) jurisdiction fails based upon the same due process concerns highlighted above. It further suggests that Rule 4(k)(2) could—at most—support jurisdiction over the turnover cause of action and not the common law causes of action (*e.g.*, fraudulent conveyance, prima facie tort, and tor-

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[10] UBAE strenuously contests that this transfer could form the basis of any claim against it because, it argues, the sale of the $250 million in bonds occurred five months before plaintiffs registered their judgment in New York. (See Letter of Ugo Colella, Esq. to Hon. Katherine B. Forrest, Apr. 22, 2013, ECF No. 395.) At this stage, however, plaintiffs need not prove the merits of their common law claims to subject UBAE to this Court's jurisdiction. The conduct UBAE admits as regards the Blocked Assets and $250 million in bonds is sufficient. Further, plaintiffs' allegations and evidence regarding the allegedly fraudulent conveyance—even if contested—are sufficient to make out a prima facie case of personal jurisdiction.

tious interference with collection of money judgment) because only the turnover cause of action involves a federal question. UBAE is incorrect.

The Court rejects UBAE's due process arguments with respect to Rule 4(k)(2) for the same reasons as those related to C.P.L.R. § 302. As to the common law claims, the Court first notes that all of the common law causes of action involve a predicate—and central—federal question. Only where plaintiffs prove that federal sovereign immunity law entitled them to turnover of the $250 million in bonds can their claims for fraudulent conveyance, prima facie tort, and tortious interference have a basis in law. These claims therefore present a sufficient federal question, even in the absence of the turnover cause of action.[11]

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[11] Statutory federal question jurisdiction exists under 28 U.S.C. § 1331 when three factors are satisfied: (1) the claims must satisfy the "well-pleaded complaint rule" (*e.g.*, that plaintiffs' complaint—rather than merely an anticipated defense or counterclaim—states a federal question), see *Louisville & N.R. Co.* v. *Mottley*, 211 U.S. 149, 153 (1908); (2) the federal question must be "sufficiently substantial" to justify the original jurisdiction of the federal courts, see *Hagans* v. *Lavine*, 415 U.S. 528, 536 (1974); and (3) the federal law at issue must be sufficiently central to the dispute to justify federal question jurisdiction, see *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). While a cause of action is typically a federal question only when it is created by federal law, see *Am. Well Works Co.* v. *Layne & Bowler Co.*, 241 U.S. 257, 260 (1916), the Supreme Court has recognized that state law-created causes of action sometimes raise federal questions. Three factors must be satisfied for a state law cause of action to constitute a federal question: (1) the case necessarily raises a federal issue, (2) the federal issue is substantial and in actual dispute, and (3) the exercise of federal jurisdiction will not disturb "any congressionally approved balance of federal and state judicial responsibilities." See *Grable & Sons Metal Products, Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). The claims asserted against UBAE fit squarely into the *Grable* rule. Plaintiffs' common law causes of action necessarily raise a federal issue—the abrogation

However, even if the common law causes of action do not involve a federal question, the Court can still exercise jurisdiction under the "pendent personal jurisdiction" doctrine. Federal courts have the discretion to "exercise 'pendent personal jurisdiction' over [defendants] with respect to claims that arise out of a common nucleus of operative facts" with the federal question claims. See, *e.g.*, *IUE AFL-CIO Pension Fund* v. *Herrmann*, 9 F.3d 1049, 1056 (2d Cir. 1993) ("where a federal statute authorizes nationwide service of process, and the federal and state claims 'derive from a common nucleus of operative fact'" the district court may assert personal jurisdiction over the parties to the related state law claims even if personal jurisdiction is not otherwise available") (quoting *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966)); *Nikbin* v. *Islamic Republic of Iran*, 471 F Supp. 2d 53, 71 (D.D.C. 2007) (citing *Oetiker* v. *Jurid Werke, GmbH*, 556 F.2d 1, 4-5 (D.C. Cir. 1997)). Rule 4(k)(2) provides a statutory basis for jurisdiction over the claims here because the turnover action (1) arises under federal law, (2) UBAE is not subject to the general jurisdiction of any state's courts, and (3) exercising jurisdiction comports with due process (as analyzed in the February 28 Opinion and above). Fed. R. Civ. P 4(k)(2); see, *e.g.*, *Bank Brussels Lambert* v. *Credit Lyonnais (Suisse) S.A.*, 192 B.R. 73, 80 (S.D.N.Y. 1996) (applying pendent personal jurisdiction doctrine based on Rule 4(k)(2) ju-

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of federal sovereign immunity law under 22 U.S.C. § 8772 and TRIA. That issue is substantial and vigorously disputed by defendants. Finally, in enacting TRIA as an exception to the Foreign Sovereign Immunities Act, Congress expressed an intent that issues surrounding sovereign immunity be adjudicated in federal courts. The causes of action regarding the $250 million in bonds thus qualify as federal question causes of action sufficient to support Rule 4(k)(2) jurisdiction on their own.

risdiction). UBAE cannot evade personal jurisdiction on plaintiffs' common law causes of action.

UBAE thus presents no "manifest error" justifying reconsideration of the denial of its 12(b)(2) motion. Given the multiple alternative bases of personal jurisdiction over UBAE, the Court will not order jurisdictional discovery or a formal evidentiary hearing.

b. Factual Statements

Finally, UBAE argues that several statements in the February 28 Opinion could mistakenly imply a factual finding that the $250 Million Bonds were fraudulently transferred out of the United States in 2008. The Court does not see such a risk. The February 28 Opinion stated that the Court "does not resolve any merits issues as regards claims based on this alleged conveyance." *Peterson*, 2013 WL 1155576, at *28 n.14. The Court reiterates that statement here; none of the language in the February 28 Order constitutes a factual finding as regards the allegations of fraudulent conveyance, prima facie tort, or interference with collection of money judgment. At this point, plaintiffs have merely alleged such activity in the SAC; they must prove their common law claims by the preponderance of the evidence following discovery.

CONCLUSION

For the reasons set forth above, Clearstream's motion for reconsideration is DENIED. UBAE's motion for reconsideration is also DENIED. The Clerk of Court is directed to close the motions at ECF Nos. 360 and 365.

SO ORDERED.

Dated: New York, New York
May 20, 2013

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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10 Civ. 4518 (KBF)

DEBORAH D. PETERSON, Personal Representative of the Estate of James C. Knipple (Dec.), et al.,
Plaintiffs,

v.

ISLAMIC REPUBLIC OF IRAN, BANK MARKAZI a/k/a CENTRAL BANK OF IRAN, BANCA UBAE SPA, CITIBANK, N.A., and CLEARSTREAM BANKING, S.A.,
Defendants.

OPINION AND ORDER

FEBRUARY 28, 2013

KATHERINE B. FORREST, District Judge:

Before this Court are eighteen groups of judgment creditors, comprised of more than a thousand individuals, who seek assets of the Islamic Republic of Iran and related entities (collectively "Iran" unless stated otherwise).[1] Each group of victims or their estates has ob-

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[1] The judgment creditor groups are defined as the plaintiffs in this action, as well as the third-party respondents named in defendant Citibank's interpleader petition. This includes the plaintiffs in the following actions: (1) *Peterson* v. *Islamic Republic of Iran* ("Peterson action"), No. 10 Civ. 4518(KBF) (S.D.N.Y.); (2) *Greenbaum et al.*

tained judgments against Iran for injury or wrongful death arising from acts of terrorism Iran sponsored, led, or in which it participated. Together, plaintiffs have obtained billions of dollars in judgments against Iran, the vast majority of which remain unpaid. These judgments

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v. *Islamic Republic of Iran, et al.* ("Greenbaum action"), 02 Civ. 2148(RCL) (D.D.C.); (3) *Acosta, et al.* v. *Islamic Republic of Iran, et al.* ("Acosta action"), 06 Civ. 745(RCL) (D.D.C.); (4) *Rubin, et al.* v. *Islamic Republic of Iran* ("Rubin action"), 01 Civ. 1655(RCL) (D.D.C.); (5) *Estate of Heiser et al.* v. *Islamic Republic of Iran et al.* ("Heiser action"), 00 Civ. 2329 and 01 Civ. 2104(RCL) (D.D.C.); (6) *Levin* v. *Islamic Republic of Iran* ("Levin action"), 05 Civ. 2494(GK) (D.D.C.); (7) *Valore, et al.* v. *Islamic Republic of Iran, et al.* ("Valore action"), 03 Civ.1959(RCL) (D.D.C.); (8) *Bonk, et al.* v. *Islamic Republic of Iran et al.* ("Bonk action"), 08 Civ. 1273(RCL) (D.D.C.); (9) *Estate of James Silvia, et al.* ("Silvia action"), 06 Civ. 750(RCL) (D.D.C.); (10) *Estate of Anthony K. Brown, et al.* v. *Islamic Republic of Iran, et al.* ("Brown action"), 08 Civ. 531(RCL) (D.D.C.); (11) *Estate of Stephen B. Bland* v. *Islamic Republic of Iran, et al.*, ("Bland action"), 05 Civ. 2124(RCL) (D.D.C.); (12) *Judith Abasi Mwila, et al.* v. *Islamic Republic of Iran, et al.* ("Mwila action"), 08 Civ. 1377(JDB) (D.D.C.); (13) *James Owens, et al.* v. *Republic of Sudan, et al.* ("Owens action"), 01 Civ. 2244(JDB) (D.D.C.); (14) *Rizwan Khaliq, et al.* v. *Republic of Sudan, et al.* ("Khaliq action"), 08 Civ. 1273(JDB) (D.D.C.). By orders dated June 27, 2011 (ECF No. 22) and July 28, 2011 (ECF No. 32), these judgment creditors were added to the consolidated action 10 Civ. 4518. In June 2012, four additional actions by way of supplemental third-party respondents to the Citibank Interpleader were added: (15) *Beer et al.* v. *Islamic Republic of Iran et al.* ("Beer action"), 08 Civ. 1807(RCL) (D.D.C.); (16) *Kirschenbaum et al.* v. *Islamic Republic of Iran et al.* ("Kirschenbaum action"), 03 Civ. 1708(RCL) (D.D.C.); (17) *Arnold et al.* v. *Islamic Republic of Iran et al.* ("Arnold action"), 06 Civ. 516(RCL) (D.D.C.), and (18) *Murphy et al.* v. *Islamic Republic of Iran et al.* ("Murphy action"), 06 Civ. 596(RCL) (D.D.C.). While these actions came to this Court originally in different procedural postures, they are all seeking collection of judgments with regard to the same assets as set forth herein, and are treated by the Court for ease of reference as "plaintiffs" herein.

were—long ago—duly registered in this district. As amongst themselves, plaintiffs have informed the Court that they have reached agreement as to the priority and manner of distribution of any recovery. (See Tr. of Nov. 27, 2012, Status Conf. at 15:19–22, ECF No. 293.)

Each group of plaintiffs seeks turnover of assets currently held at Citibank, N.A. ("Citibank"), as part of efforts to satisfy these outstanding judgments. (Second Am. Compl., ECF No. 160.) Citibank is a stakeholder without interest in the ultimate outcome of this dispute. (Third Party Pet. in Nature of Interpleader ("Citibank Interpleader"), ECF No. 38.) Its interest is in resolution of ownership of funds held in the account so that it may, if and when requested, ensure that the funds are appropriately disbursed. (See Letter of Sharon L. Schneier to the Hon. Katherine B. Forrest, Dec. 14, 2012, ECF No. 300 (noting "Citibank is a neutral stakeholder in this proceeding")).

These actions have been litigated in fits and starts; some of the delays are certainly attributable to the fact that established procedures for obtaining writs of attachment, restraining funds and executing judgments thereon are not well suited to large, complex actions such as this. For instance, for a number of years many of the actions were categorized as "miscellaneous" and were not assigned to any particular judge. Additionally, litigation against any sovereign inserts legal complexities. Finally, the basic fact that billions of dollars are at stake virtually insures vigorous litigation. And without a doubt these actions have been vigorously litigated. All matters as to each of the eighteen creditor groups have been collected together and proceeded before this Court since December 10, 2012.

Defendants do not dispute the validity of plaintiffs' judgments. They do, however, dispute that the assets held at Citibank are subject to turnover, and that this Court has jurisdiction over those assets or over certain defendants. Defendants Bank Markazi, UBAE and Clearstream have also raised issues of state, federal (including a number of constitutional arguments), and international law to oppose turnover.

Currently before this Court are five groups of motions:

First, defendants UBAE S.p.A. ("UBAE") and Clearstream Banking S.A. ("Clearstream") have separately moved to dismiss the claims against them for lack of personal jurisdiction. (ECF Nos. 295, 299, 301.) Plaintiffs have opposed these motions. (ECF Nos. 302, 306, 313, 323, 324.)

Second, Bank Markazi has moved to dismiss the claims against it for lack of subject matter jurisdiction. (ECF No. 205.) Plaintiffs have opposed that motion. (ECF No. 219.)

Third, defendant Clearstream has renewed its earlier motion to vacate restraints. (ECF No. 174.) Plaintiffs oppose this motion. (ECF No. 199.)

Fourth, all plaintiffs have moved (or joined in the motion) for partial summary judgment for turnover of the assets held at Citibank. (ECF Nos. 209, 307.) Defendants Bank Markazi, UBAE, and Clearstream oppose this motion; defendant Citibank takes no position beyond its reliance on the arguments raised by the other parties. (ECF Nos. 261, 282, 284, 286, 300, 328.)

Fifth, the Bland judgment creditors have moved to authorize execution and/or attachment against assets of Iran. (ECF No. 305.)

Altogether, these motions and supporting materials consume several thousands of pages. For the reasons set forth below, this Court denies each of the defendants' motions, grants plaintiffs' motion for partial summary judgment and turnover and grants the Bland plaintiffs' motion to execute.

I. FACTUAL BACKGROUND

The following facts are undisputed unless otherwise noted. Bank Markazi is the Central Bank of Iran, an agency of the Iranian Government. By 2008, Bank Markazi had over $2 billion in bonds (the "Markazi Bonds") denominated in U.S. dollars held in an account with defendant Clearstream S.A. Those bonds have subsequently been split into two groups relevant to this action: first, $1.75 billion in cash proceeds of the bonds are held in an account at Citigroup in New York; these proceeds are subject to restraints imposed by the Court, by Executive Order, and by statute. The proceeds are the subject of, *inter alia*, plaintiffs' motion for partial summary judgment and turnover and Clearstream's motion to vacate the restraints. The second group consists of two securities—with a face value of $250 million—that were originally part of the Markazi Bonds. Following a June 2008 evidentiary hearing in which Judge Koeltl lifted the restraints as to those two securities, they were sold on the open market. The $250 million are relevant to several of plaintiffs' claims, but are not addressed by the pending turnover motion or the motion to vacate the restraints.

Prior to maturity, each Markazi Bond (from both groups) had been issued in physical form and was registered with either the Federal Reserve Bank of New York ("FRBNY") or the Depository Trust Company ("DTC"), also located in New York. Accordingly, prior to maturity,

the FRBNY and the DTC were the custodians of the Markazi Bonds.

For a period of years, Bank Markazi maintained an account with Clearstream S.A. which, in turn, maintained a correspondent account on its behalf at Citibank to handle funds associated with the bonds, including interest and principal payments.

Clearstream Luxembourg is an "international service provider for the financial industry offering securities settlement and custody-safekeeping services." (See Clearstream Consolidated Mem. of L. in Support of its Renewed Mot. to Vacate Restraints at 1.) "Clearstream serves as an intermediary between financial institutions worldwide to ensure that transactions from one bank to another are efficiently and successfully completed." (*Id.* at 1–2.) "As a post trade services provider currently covering the international and 52 domestic markets, Clearstream has over 2,500 financial institutions from all over the world among its customer base ." (*Id.* at 2.)

One of Clearstream's offices is in New York City. At all times relevant to these motions, the office that Clearstream maintained in New York engaged in sales, marketing and administrative activities relating to Clearstream's international financial services business. The New York office employed New York-based staff. Those New York employees had access to facilities supportive of sales and marketing efforts such as office space, telephones, email access and addresses and fax lines. Clearstream paid its New York staff out of bank accounts maintained in New York. Since 2002, Clearstream has been registered with New York State to maintain a representative office and conduct certain activities in New York. There is no evidence in the record that Clearstream's New York office was a depository institution.

Nor is there evidence in the record that Clearstream's Luxembourg office attempted to maintain any corporate separation from its New York office. Indeed, based on Clearstream's submissions in this matter, its New York office was intended to act as a sales and marketing arm for its Luxembourg operations. Clearstream Luxembourg used its New York office to seek additional business for its Luxembourg-based financial organization and also used it to ensure seamless service to clients by maintaining points of contact in New York.

Over the years, Citibank has maintained an account in New York for Clearstream, to which the proceeds of the Markazi Bonds were posted. The parties dispute the extent to which Clearstream's New York office was involved in activities relating to the account it maintained at Citibank in New York on behalf, first, of Bank Markazi and later on behalf of defendant UBAE—in connection with services provided with respect to the Markazi Bonds. However, as set forth below, the resolution of that factual dispute is unnecessary to resolution of the instant motions.

From time to time, interest was paid on the bonds and posted to Clearstream's account at Citibank. As the bonds matured, the proceeds were credited to that same account.

In 2008, UBAE, a bank located in Italy, opened a new account with Clearstream, its second such account.[2] The record evidence supports UBAE's position that this ac-

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[2] Plaintiffs urge that the timing of UBAE's actions with respect to opening its account with Clearstream and engagement in various transactions with Bank Markazi demonstrate that Bank Markazi was engaged in efforts to avoid the very turnover now at issue. In resolving these motions, this Court need not and does not refer to that timeline, or any inferences which a finder of fact might draw thereon.

count was opened at Clearstream's Luxembourg office. Following the opening of that account, Clearstream recorded a transfer of the entirety of the Markazi Bonds from Bank Markazi to UBAE—plaintiffs point to evidence that this transfer was marked "free of payment".

According to UBAE, in 2008, Bank Markazi asked that UBAE close and sell two securities—with a face value of $250 million[3]—held in the new UBAE custodial account located at Clearstream Luxembourg. (Reply Decl. of Biagio Matranga to Pls.' Opp. to Def. UBAE's Mot. to Dismiss ("Matranga Reply Decl.") ¶ 7, ECF No. 308.) UBAE negotiated a selling price and offered to buy the securities from Bank Markazi at a price slightly lower than the negotiated selling price, the difference representing its fee for the transaction. (*Id.* ¶ 8.) The sale to the third party customers occurred in Luxembourg and customers of Clearstream Luxembourg purchased both securities. (*Id.* ¶¶ 9–10.) UBAE concedes that this sale was performed at the request of and for the benefit of Bank Markazi. (*Id.* ¶ 13.)

Plaintiffs allege that, despite any allegations that the sale of the $250 million in Markazi Bonds occurred in Luxembourg, the defendants arranged for the transfer of the dollar-denominated bond proceeds from the Citibank account in New York to UBAE. (SAC ¶ 98.) Clearstream allegedly instructed Citibank to transfer the cash proceeds of the $250 million from the holding account to Clearstream's cash account. (*Id.*) Next, Clearstream instructed Citibank to make an electronic funds transfer ("EFT") of the cash from Citibank to UBAE's corre-

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[3] The bonds associated with these transactions were those as to which Judge Koeltl had lifted the restraints following the evidentiary proceeding held in June 2008. One of plaintiffs' claims for fraudulent conveyance relate to the proceeds from those bonds.

spondent bank in New York, HSBC. (*Id.* ¶¶ 100, 214.) Finally, UBAE, acting on behalf of Bank Markazi, then wired the cash from HSBC to UBAE in Italy.

After the sale of the $250 million, over $1.75 billion in proceeds [of] the Markazi Bonds thus remain in the UBAE / Clearstream account currently at Citibank in New York. On a number of occasions, Bank Markazi has stated that it owns the Markazi Bonds and all proceeds associated with them (now held in the Citibank account). It has stated that "Over $1.75 billion in securities belonging to Bank Markazi are frozen in a custodial Omnibus Account at [Citibank]"; that the "Restrained Securities are the property of Bank Markazi, the Central Bank of Iran", that the "aggregate value of the remaining bond instruments, *i.e.* the Restrained Securities that are the property of Bank Markazi and the subject of the Turnover Action—is thus $1.753 billion"; that the "Restrained Securities are the property of a Foreign Central Bank "; that the "Restrained Securities are presumed to be the property of Bank Markazi"; and "the Restrained Securities are prima facie the property of a third party, Bank Markazi " (See Bank Markazi's First Mem. of L. in Support of its Mot. to Dismiss the Am. Compl. ("Markazi's First MOL") at 1, 5, 9, 10, 36, ECF No. 18.) In addition, two officers of Bank Markazi have sworn under penalty of perjury that the Blocked Assets are the "sole property of Bank Markazi and held for its own account." (Aff. of Gholamossein Arabieh ¶ 2, Decl. of Liviu Vogel in Support of Pls.' Mot. for Partial Summ. Judgment ("Vogel Decl."), Ex. J, Oct. 17, 2010, ECF No. 210; Aff. of Ali Asghar Massoumi ¶ 2, Vogel Decl. Ex. K, Oct. 17, 2010, ECF No. 210). UBAE has similarly asserted that it does not have a "legally cognizable interest in the restrained bonds." (See UBAE

Mem. of L. in Opp. to Pls.' Mot. for Summ. J. ("UBAE S.J. Opp. Br.") at 2, ECF No. 328.)

All initial transactions relating to payment of interest and principal for the Markazi Bonds have occurred in New York. Clearstream's Citibank account has been credited with any such payments. Prior to the 2008 "free of payment" transfer, Clearstream's procedure was then to credit Bank Markazi's Clearstream account with the appropriate amounts; following the transfer, Clearstream has credited such amounts to UBAE. UBAE concedes that it has paid interest to Bank Markazi related to the bonds; such interest payments were credited to Bank Markazi's account with UBAE in Rome. (See Decl. of Biagio Matranga ("Matranga Decl.") ¶ 15, ECF No. 95.) UBAE maintained its correspondent account at HSBC in New York until at least some time in 2009. (*Id.* ¶ 5.)

UBAE acknowledges that at the close of each day, and sometimes more than once a day, its treasurer (located in Italy) arranges for electronic transfers of the balance of any of its proprietary international U.S. Dollar accounts to its U.S. Dollar correspondent account at HSBC in New York, where they are pooled and may be transferred to Italy. (See *id.*)

In 2012, the last of the Markazi Bonds matured. Clearstream's account at Citibank currently consists of cash associated with the bonds.[4]

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[4] The cash held in Clearstream's Citibank account is herein referred to as the "Blocked Assets." The terms "blocked" and "restrained" have particular legal importance. As discussed, *infra*, the Blocked Assets have been "blocked" pursuant to statute. The Blocked Assets were "restrained" pursuant to statute and by the writs of attachment previously obtained by the plaintiffs herein.

UBAE sold the bonds and Clearstream, on behalf of UBAE, instructed Citibank New York to transfer the cash proceeds of the sale from Citibank New York to Clearstream's account at Citibank New York. As with the $250 million sale, when UBAE requested a withdrawal, Clearstream instructed Citibank to make an EFT through Clearstream's correspondent bank, JP Morgan Chase in New York, to UBAE's correspondent bank in New York, HSBC.

On June 12, 2008, this Court issued a writ of execution as to the Blocked Assets. (ECF No. 84.) This writ was levied upon Citibank as of June 13, 2008. The legal effect of levying this writ upon the Markazi Bonds and associated bank accounts was to restrain those assets. On October 17, 2008, this Court issued a second writ of execution, this time against Clearstream Banking S.A. (ECF No. 118.) Plaintiffs served Citibank and Clearstream Banking S.A. with Restraining Notices and Amended Restraining Notices later in June 2008. On June 27, 2008, this Court ordered that the Markazi Bonds and associated accounts (all encompassed within the category of "Blocked Assets") remain restrained until further order. (ECF No. 103.) Various extensions of the original restraints were issued by this Court in June 2009, May and June 2010. (ECF No. 171; Vogel Decl. Ex. G, Order Extending Levy, 18 Misc. 302(BSJ) (S.D.N.Y. May 10, 2010), ECF No. 210; *Id.* Ex. H, Order Extending Levy, 18 Misc. 302(BSJ) (S.D.N.Y. June 11, 2010).)

On June 8, 2010, following two years of legal activity in the Southern District of New York relating to the Blocked Assets (including registering judgments, obtaining restraining orders, and issuing writs of attachment, see generally Vogel Decl. Exs. B, C, D, U), the Peterson plaintiffs filed the original complaint which commenced

this action, seeking, *inter alia*, turnover of the Blocked Assets. This had the legal effect of continuing the restraints on those assets pursuant to N.Y. C.P.L.R. §5232(a), until transfer or payment in the amount of the Blocked Assets is made.

The First Amended Complaint was filed on October 20, 2010 (ECF No. 3), and the Second Amended Complaint ("SAC"), the operative complaint in this matter, was filed on December 7, 2011. (ECF No. 160.) The SAC asserts eight causes of action including (1) a declaration that Bank Markazi is an agent and/or alter ego of Iran, the Restrained Bonds are beneficially owned by Iran and are subject to execution for enforcement of Plaintiffs' judgments, and that the Restrained Bonds are not covered by 28 U.S.C. § 1611(b)(1); (2),(3) rescission of allegedly fraudulent conveyances by Iran, Bank Markazi, and Clearstream under New York Debtor and Creditor Law §§ 276(a) and 273-a; (4),(5) turnover of the Markazi Bonds under N.Y. C.P.L.R. §§ 5225 and 5227; (6) equitable relief against all defendants; (7) tortious interference with collection of money judgment, and (8) prima facie tort against UBAE and Clearstream.

On February 5, 2012, President Obama issued Exec. Order No. 13,599 ("E.O. 13599"), 77 Fed. Reg. 6659. E.O. 13599 declared that "[a]ll property and interests" in property of Iran and held in the United States, were "blocked" under his authority pursuant to the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701.

E.O. 13599 had the effect of turning any restrained assets owned by the Iranian government (or any agency or instrumentality thereof) into "Blocked Assets" As Bank Markazi is the Central Bank of Iran, any of its assets lo-

cated in the United States as of February 5, 2012, became "Blocked Assets" pursuant to E.O. 13599.

Citibank complied with its obligations under E.O. 13599 by reporting the Clearstream account proceeds to the Office of Foreign Assets Control ("OFAC") and placing proceeds relating to the Markazi Bonds into a segregated interest bearing account (this has been referred to from time to time as the "omnibus" account). That account is maintained in the Southern District of New York. As of April 2012, the Blocked Assets in that Citibank account now consist solely of cash.

II. LAW RELEVANT TO ALL MOTIONS

A. The Foreign Sovereign Immunities Act

Generally, U.S. law provides that a foreign sovereign is entitled to immunity from legal action in the United States. See Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602–1611.

The FSIA codifies "the restrictive theory of sovereign immunity." *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). The Supreme Court found that when Congress enacted the FSIA, it intended to ensure that "duly created instrumentalities of a foreign state are to be accorded a presumption of independent status." See *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611, 627 (1983). The "presumption of independent status" is not to be "lightly overcome." *Hercaire Int'l, Inc.* v. *Argentina*, 821 F.2d 559, 565 (11th Cir. 1987). Such "instrumentalities" include a foreign state's "political subdivisions and agencies or instrumentalities," as set forth in the statute. See *Hester Int'l Corp.* v. *Federal Republic of Nigeria*, 879 F.2d 170, 176 n.5 (5th Cir. 1989) (emphasis added).

The property of a sovereign's central bank is immune from attachment under certain circumstances, including if the property is that of a central bank held for its own account. 28 U.S.C. § 1611(b)(1).

The FSIA does, however, provide exceptions to immunity in connection with legal proceedings seeking attachment to fulfill a judgment:

> (b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States if—
>
> > (2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3) or (5) or 1605(b), or 1605A of this chapter

28 U.S.C. § 1610 (emphasis added).

Section 1605A, the "Terrorism Exception to the Jurisdictional Immunity of a Foreign State", provides:

> (a) In general—
>
> > (1) No immunity—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources

> is engaged in by an official, employee, or agent of such foreign state

28 U.S.C. § 1605A.

According to § 1603 of the FSIA, a "foreign state" includes "a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." 28 U.S.C. § 1603(a). Subsection (b) provides:

> (b) An 'agency or instrumentality of a foreign state' means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b).

Thus, in order to pierce through the FSIA, including its provision for central bank immunity, the Court must undertake various analyses. The first question is whether the assets at issue are in fact "Iranian" and the judgments in compensation for acts of terrorism. This analysis complies with 28 U.S.C. §§ 1603, 1605A, and 1610. Next, for central bank assets, specifically, the Second Circuit has adopted a functional test that asks whether those assets are used for central bank functions as normally understood, irrespective of their commercial nature. See *NML Capital, Ltd.* v. *Banco Central de la Republica Argentina*, 652 F.3d 172, 194 (2d Cir. 2011). Un-

der *NML*, if the property at issue is that of a central bank, to execute against such property, a plaintiff must demonstrate "with specificity that the funds are not being used for central banking functions as such functions are normally understood." *Id.* at 194. However, other statutes (as discussed below) provide for alternative ways to reach such assets.

B. TRIA

The Terrorism Risk Insurance Act of 2002 ("TRIA"), codified in a note to the FSIA, allows a plaintiff to execute against "blocked" assets of a terrorist party. TRIA states, in relevant part:

> Notwithstanding any other provision of law in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28 United States Code, the blocked assets of that terrorist party shall be subject to execution or attachment in aid of execution in order to satisfy any judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA § 201(a), Pub. L. No. 107-297, Title II, 116 Stat. 2337 (2002) (emphasis added).

TRIA defines the term "terrorist party" as "a terrorist, terrorist organization , or a foreign state designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371)." TRIA § 201(d)(4). Iran has been designated as a "state sponsor of terrorism" under section 6(j) of the Export Administration Act of 1979 since

January 19, 1984. State Sponsors of Terrorism, U.S. Dep't of State, at http://www.state.gov/j/ct/c14151.htm (last visited July 27, 2012). TRIA's broad language—"notwithstanding any other provision of law . in every case"—provides one basis pursuant to which a separate "central bank" analysis becomes unnecessary; TRIA trumps the central bank provision in 28 U.S.C. § 1611(b)(2).

C. The IEEPA and E.O. 13599

In 1977, Congress enacted the International Emergency Economic Powers Act ("IEEPA"). 50 U.S.C. §§ 1701, 1702. The IEEPA authorizes the president to take broad-ranging action against the financial assets and transactions of those entities he determines pose an "unusual and extraordinary threat" to the national security of the United States. *Id.* On February 6, 2012, pursuant to his authority under IEEPA, President Obama issued Executive Order ("E.O.") 13599. E.O. 13599 provides that:

> [a]ll property and interests in property of the Government of Iran, including the Central Bank of Iran, that are in the United States, that are or hereafter come within the United States, or that hereafter come within the possession or control of any United States person, including any foreign branch, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.

Exec. Order No. 13,599, 77 Fed. Reg. 26 (Feb. 6, 2012) (emphasis added). For purposes of E.O. 13599, the "Government of Iran" is "any political subdivision, agency or instrumentality thereof, and any [individual or entity] owned or controlled by, or acting for or on behalf of, the Government of Iran." *Id.* That definition is similar to

the definition promulgated by the Department of Treasury:

> (a) The state and the Government of Iran, as well as any political subdivision, agency or instrumentality thereof; (b) Any entity owned or controlled directly or indirectly by the foregoing; (c) Any person to the extent that such person is, or has been, or to the extent that there is reasonable cause to believe that such person is, or has been, since the applicable effective date, acting or purporting to act directly or indirectly on behalf of any of the foregoing.

31 C.F.R. § 560.304.

Thus, as a matter of law, Bank Markazi's (indisputably the Central Bank of Iran) assets were "blocked" on February 6, 2012. "Blocking" Bank Markazi's assets located in the U.S.—and, here, in the Southern District of New York—has the effect of restraining them and prevents any transfer or dealing in those assets. The writs of attachment previously obtained had already restrained Bank Markazi's assets held at Citibank. However, to the extent UBAE asserts it has any control relating to those assets, it (as discussed below) simply fits within E.O. 13599's provision for a person acting "directly or indirectly" on behalf of Iran.

The Office of Foreign Assets Control ("OFAC"), operating under the United States Department of Treasury, has determined that "E.O. 13599 requires U.S. persons to block all property and interests in property of the Government of Iran, unless otherwise exempt under OFAC." Frequently Asked Questions and Answers, U.S. Dep't of Treasury (hereinafter "OFAC FAQs"), available at http://www.treasury.gov/resource-center/faqs/Sanctions-/Pages/answer.aspx (last visited July 25, 2012); see also 31 C.F.R. § 501.603(a)(1) ("Any person holding prop-

erty blocked pursuant to this chapter must report."). According to the OFAC "Fact Sheet", "[a]mong other things, the E.O. [13599] freezes all property of the Central Bank of Iran and all other Iranian financial institutions, as well as all property of the Government of Iran " See OFAC Regulations for the Financial Community, Dep't of the Treasury § V(A) (Jan. 24, 2012); Fact Sheet: Implementation of National Defense Authorization Act Sanctions on Iran, U.S. Dep't of Treasury, available at http://www.treasury.gov/press-center/press-releases/Pages/tg1409.aspx (last visited July 25, 2012).

OFAC periodically publishes a list of "Specially Designated Nationals and Blocked Persons" (the "SDN list"). The SDN list aids the Court to determine which entities are known to be blocked. That list, however, purports to be neither exhaustive nor exclusive. It cannot be used as a sole reference point in connection with a determination as to whether a particular entity's assets are in fact "blocked" pursuant to E.O. 13599. In general, and therefore left to judicial determination, "E.O. 13599 blocks the property and interests in property of any individual or entity that comes within its definition of the term 'Government of Iran' regardless of whether it is listed on the SDN List " OFAC FAQs. The Government of Iran and Bank Markazi are on the SDN list. Clearstream and UBAE are not.

The SDN list is updated when individuals, entities or the Treasury report assets owned by Iran. According to OFAC, "E.O. 13599 requires U.S. persons to block all property and interests in property of the Government of Iran, unless otherwise exempt under OFAC." See 31 C.F.R. § 501.603(a)(1) ("Any person holding property blocked pursuant to this chapter must report.") In connection with its OFAC reporting obligations, in February

2012—four years after the "free of payment" transfer of the bonds to UBAE—Citibank reported to the U.S. Treasury the account it maintained for Clearstream in connection with the Bank Markazi Bonds.

D. The Newest Act: 22 U.S.C. § 8772

On August 10, 2012, the Iran Threat Reduction and Syria Human Rights Act of 2012 (the "2012 Act") went into effect. 22 U.S.C. § 8701, *et seq.* The 2012 Act does not eliminate any of the authority and bases for blocking or executing against certain assets as set forth under the FSIA or TRIA. It does, however, provide a separate and additional basis for execution on assets in aid of fulfilling judgment. Section 502 of the 2012 Act (22 U.S.C. § 8772) states:

> (a) Interests in blocked assets
>
> (1) In general
>
> Subject to paragraph (2), notwithstanding any other provision of law, including any provision of law relating to sovereign immunity and preempting any inconsistent provision of State law, a financial asset that is—
>
> (A) held in the United States for a foreign securities intermediary doing business in the United States;
>
> (B) a blocked asset (whether or not subsequently unblocked) that is the property described in subsection (b); and
>
> (C) equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran or any agency or instrumentality of that Government, that such foreign securities inter-

mediary or a related intermediary holds abroad,

shall be subject to execution or attachment in aid of execution in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death

(2) Court determination required

In order to ensure that Iran is held accountable for paying the judgments described in paragraph (1) and in furtherance of the broader goals of this Act to sanction Iran, prior to an award turning over any asset the court shall determine whether Iran holds equitable title to, or beneficial interest in, the assets described in subsection (b) and that no other person possesses a constitutionally protected interest in the assets described in subsection (b) under the Fifth Amendment to the Constitution of the United States. To the extent the court determines that a person other than Iran holds—

(A) equitable title to, or a beneficial interest in, the assets described in subsection (b) . ; or

(B) a constitutionally protected interest in the assets described in subsection (b),

such assets shall be available only for execution or attachment in aid of execution to the extent of Iran's equitable title or beneficial interest therein .

(b) Financial assets described

The financial assets described in this section are the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in *Pe-*

terson, et al. v. *Islamic Republic of Iran, et al.*. . . that were restrained by restraining notices and levies secured by plaintiffs in those proceedings .

. . .

(3) Financial asset; securities intermediary

.

The term "Iran" means the Government of Iran, including the central bank or monetary authority of that Government and any agency or instrumentality of that Government.

22 U.S.C. § 8772 (emphases added).

As the statute relates specifically to the instant action, its interpretation is a matter of first impression.

On its face, the statute sweeps away the FSIA provision setting forth a central bank immunity, 28 U.S.C. § 1611(b)(1); it also eliminates any other federal or state law impediments that might otherwise exist, so long as the appropriate judicial determination is made. 22 U.S.C. § 8772(a)(2). If UBAE is merely an agent acting directly or indirectly on behalf of Iran, then the 2012 Act provides that assets it holds for Iran are subject to execution if its requirements are met; the 2012 Act therefore provides a separate basis—in addition to the FSIA and TRIA—for execution.

III. DEFENDANTS' MOTIONS TO DISMISS

Each defendant—Clearstream, UBAE, and Bank Markazi—has filed a separate motion to dismiss.

A. UBAE and Clearstream Motions to Dismiss

Clearstream and UBAE have moved pursuant to Fed. R. Civ. P. 12(b)(2) to dismiss all claims against them for lack of personal jurisdiction. It is undisputed that each is a nonresident defendant. Both Clearstream and UBAE

argue that they are based in Europe and have no presence in New York.

i. Standard of Review for Personal Jurisdiction

Plaintiffs bear the burden to establish personal jurisdiction as to each defendant. See *MacDermid Inc.*, v. *Deiter*, 702 F.3d 725, 727–28 (2d Cir. 2012) (citing *Seetransport Wiking Trader Schiffarhtsgellschaft MBH & Co., Kommanditgesellschaft* v. *Navimpex Centrala Navala*, 989 F.2d 572, 580 (2d Cir. 1993)). Jurisdiction is measured at the time that plaintiffs filed suit. (See Banca UBAE Mem. of L. in Suppt. of Mot. to Dismiss ("UBAE MTD Br.") at 3.) See *Klinghoffer* v. *S.N.C. Achille Lauro*, 937 F.2d 44, 52 (2d Cir. 1991). Prior to trial, when a motion to dismiss for lack of personal jurisdiction is based on affidavits and other written materials, a plaintiff need only make a prima facie showing. See *MacDermid*, 703 F.3d at 727. The Court is required to accept the allegations in the complaint as true so long as they are uncontroverted by defendant's affidavits. *Id.*

In order for this Court to exercise personal jurisdiction, such jurisdiction must have a statutory basis and comport with the due process clause of the Fifth Amendment. See Fed. R. Civ. P. 4(k); *Chloe* v. *Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 163–65 (2d Cir. 2010); *Grand Rivers Enters. Six Nations, Ltd.* v. *Pryor*, 425 F.3d 158, 165 (2d Cir. 2005).

ii. Discussion

Plaintiffs argue that Fed. R. Civ. P 4(k)(1)(A)—which permits this Court to exercise personal jurisdiction to the extent of the applicable New York statutes—provides the basis for personal jurisdiction. The Court agrees with that assessment, but finds two additional bases on which personal jurisdiction is proper: first, general jurisdiction

exists over Clearstream under Rule 4(k)(1)(A). Second, even if jurisdiction is not proper under the New York long arm statute, Fed. R. Civ. P. 4(k)(2) provides an alternative basis for personal jurisdiction as to UBAE.

As to Rule 4(k)(1)(A)—the sole basis of jurisdiction asserted by plaintiffs—this Court must determine whether either general or specific personal jurisdiction exists under the relevant New York statutes.

a. General Jurisdiction under C.P.L.R. § 301

Under N.Y. C.P.L.R. § 301, "general jurisdiction is established if the defendant is shown to have 'engaged in continuous, permanent, and substantial activity in New York.'" See, *e.g.*, *United Mobile Technologies, LLC* v. *Pegaso PCS, S.A. de C.V.*, 11-2813-CV, 2013 WL 335965 (2d Cir. Jan. 30, 2013). For general jurisdiction over a foreign corporation, this requires a showing that the corporation is "doing business" in New York, "not occasionally or casually, but with a fair measure of permanence and continuity." See, *e.g.*, *Gallelli* v. *Crown Imports, LLC*, 701 F Supp. 2d 263, 271 (E.D.N.Y. 2010) (quoting *Hoffritz for Cutlery, Inc.* v. *Amajac, Ltd.*, 763 F.2d 55, 58 (2d Cir. 1985)). The claim over which plaintiffs seek to assert personal jurisdiction over the defendants need not relate to the activity that gives rise to general jurisdiction. See *Hoffritz for Cutlery*, 763 F.2d at 58.

To determine whether a corporate defendant is "doing business" in New York, courts look [to] factors such as "the existence of an office in New York; the solicitation of business in the state; the presence of bank accounts and other property in the state; and the presence of employees of the foreign defendant in the state." See *id.*

b. Specific Jurisdiction under C.P.L.R. § 302(a)(1)

Even in the absence of the systematic presence needed for "doing business" jurisdiction, a plaintiff may properly assert specific jurisdiction based on its "transacting business" in New York—*i.e.*, where a defendant, itself "'or through an agent transacts any business within the state, so long as the plaintiff's 'cause of action aris[es] from' that 'transact[ion].'" See *Licci ex rel. Licci* v. *Lebanese Canadian Bank, SAL* (hereinafter "*Licci I*"), 673 F.3d 50, 60 (2d Cir. 2012); *Best Van Lines, Inc.* v. *Walker*, 490 F.3d 239, 240 (2d Cir. 2007).

To establish that an entity or its agent has transacted business within New York, a plaintiff must demonstrate a defendant's purposeful availment of the privilege of conducting business in New York. *Licci*, 673 F.3d at 61. The central inquiry relates to the "quality" of a defendant's contacts with New York—*i.e.*, whether the contacts indicate an intent to invoke the benefits and privileges of New York law. *Id.*; see also *Deutsche Bank Sec., Inc.* v. *Montana Bd. of Invs.*, 7 N.Y.3d 65, 72 (2006); see also *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985).

It is perhaps counterintuitive—but nonetheless well-established—that for purposes of establishing that a defendant has "transacted business" within New York, the defendant or its agent need not have physically entered New York; the question is whether the defendant or its agent engaged in purposeful activities in New York. See *Best Van Lines*, 490 F.3d at 249.

Purposeful availment is thus a fact-based inquiry: a single telephone call to place a single order in New York that would be sent to another state or the transitory presence of a corporate official may not be sufficient under certain circumstances. *Licci I*, 673 F.3d at 62. Yet,

in another case, *Deutsche Bank*, the Court found that a sophisticated investor who may use electronic devices to "enter" New York to conclude a substantial transaction, met the "transacting business" requirement. 7 N.Y.3d at 72.

A court is thus required to look at the totality of the circumstances. See *Licci I*, 673 F.3d at 62. Instructive in this regard—especially for this case—is the Second Circuit's recent opinion in *Licci I*. In *Licci I*, the Second Circuit certified to the New York Court of Appeals the question of whether a defendant's maintenance and frequent use of a correspondent bank in New York (to effect international wire transfers) met the requirements of the New York long-arm statute. *Id.* at 66. The New York Court of Appeals found that, under the circumstances there presented, it did.

In certifying the question, the Second Circuit examined cases in which personal jurisdiction was based on the use of a correspondent bank. It found that in some instances the mere presence of having a correspondent bank account might be insufficient to confer jurisdiction, *id.* at 63–64, yet in others the use of a correspondent bank account might be sufficient. *Id.*

For instance, in *Amigo Foods Corp.* v. *Marine Midland Bank–N.Y.*, 39 N.Y.2d 391, 394 (1976), an out-of-state bank passed letters of credit through a correspondent New York bank. While the Appellate Division initially dismissed such use as insufficient to meet the requirements of New York's long-arm statute, the Court of Appeals reversed and remanded for jurisdictional discovery. *Id.* at 396. The Court of Appeals agreed that the mere presence of a correspondent bank in New York was not in and of itself sufficient to confer jurisdiction, but it allowed discovery as to whether there were other facts in-

dicating sufficient use of the correspondent bank account to do so. *Id.*

In a later case, the Court of Appeals found that use of a correspondent bank in connection with securities transactions was sufficient to meet the requirements of C.P.L.R. § 302(a). See *Ehrlich-Bober & Co.* v. *Univ. of Houston*, 49 N.Y.2d 574, 577, 580–82 (1980).

Similarly, the Court of Appeals upheld the exercise of personal jurisdiction over a Russian bank that maintained and used a correspondent bank account through which it engaged in currency-exchange options transactions with the plaintiff. See *Indosuez International Finance B.V.* v. *National Reserve Bank*, 98 N.Y.2d 238, 247 (2002).

In addition, the Second Circuit noted in *Banco Ambrosiano* v. *Artoc Bank & Trust*, 62 N.Y.2d 65, 72 (1984) that the use of the correspondent account to effect the transactions at issue in the lawsuit was sufficient to meet the requirements of due process for quasi-in rem jurisdiction. *Licci I*, 673 F.3d at 64. (The holding in that case was based on considerations of due process; the Second Circuit found it nonetheless relevant insofar as statutory and constitutional inquiries in New York have become entangled. *Id.* at 64 (quoting from *Best Van Lines*, 490 F.3d at 242.))

Resolving any ambiguities in these cases, the Court of Appeals answered the Second Circuit's certified question in the affirmative; a defendant's maintenance and frequent use of a New York correspondent account can be sufficient for "transacting business" jurisdiction under C.P.L.R. § 302(a). See *Licci* v. *Lebanese Canadian Bank, SAL* (hereinafter "*Licci II*"), 2012 WL 5844997 (N.Y. Nov. 20, 2012).

The facts of *Licci II* bear certain similarities to those before this Court such that they bear reciting in some detail. There, plaintiffs were several dozen American, Canadian and Israeli citizens who were injured or whose family members were injured or killed in rocket attacks allegedly launched by Hizballah in 2006. *Id.*, at *1. Hizballah had been declared a terrorist organization by the United States Department of State. *Id.* Plaintiffs commenced a lawsuit in the Southern District of New York against the Lebanese Canadian Bank, SAL ("LCB"), alleging that LCB had assisted Hizballah in its terrorist acts by facilitating certain financial transactions. LCB did not operate branches or offices, or maintain employees in New York. Its sole "point of contact with the United States was a correspondent bank account with AmEx in New York." *Id.*, at *2. The complaint alleged that LCB used the correspondent bank account to transfer funds that enabled, *inter alia*, the attacks which killed or injured plaintiffs or their relatives. *Id.*

In its analysis, the Court of Appeals acknowledged the fact-specific nature of an inquiry as to whether personal jurisdiction can be based on maintenance and use of a correspondent bank. *Id.*, at *3. Ultimately the Court found that "complaints alleging a foreign bank's repeated use of a correspondent account in New York on behalf of a client—in effect, a 'course of dealing' show purposeful availment of New York's dependable and transparent banking system, the dollar as a stable and fungible currency, and the predictable jurisdictional and commercial law of the United States." *Id.*, at *3. The Court further found that there had to be some relatedness between the use of the correspondent bank and the claim at issue—the claim could not be "completely unmoored" from the transaction utilizing the correspondent account. In that

case, the complaint alleged that LCB used the correspondent account repeatedly to support a terrorist organization. *Id.* *4.

Under New York law, then, a foreign bank's maintenance and use of a correspondent account in New York can be sufficient to support personal jurisdiction, at least where transactions indicate purposeful availment of New York's banking system and those transactions relate to the claim at issue.

c. Statutory Jurisdiction under Rule 4(k)(2)

Even if personal jurisdiction under the C.P.L.R. is not proper, however, that does not signify that a nondomiciliary entity is automatically outside this Court's jurisdiction. Assuming, *arguendo*, that no C.P.L.R.-based jurisdiction exists, to the extent federal questions are at issue—and plaintiffs have asserted such questions here—the Court might still exercise personal jurisdiction under the federal question personal jurisdiction statute, Fed. R. Civ. P. 4(k)(2).

Rule 4(k)(2) subjects a defendant to this Court's personal jurisdiction where plaintiff demonstrates that (1) the claim arises under federal law; (2) the defendant is not "subject to jurisdiction in any state's courts of general jurisdiction"; and (3) the exercise of jurisdiction is "consistent with the United States Constitution and laws"—*e.g.*, it comports with due process. See *Porina* v. *Marward Shipping Co., Ltd.*, 521 F.3d 122, 127 (2d Cir. 2008).

As with 4(k)(1)(A) jurisdiction, plaintiff need only raise a prima facie case that 4(k)(2) jurisdiction is proper to survive a Rule 12(b)(2) motion to dismiss. See, *e.g.*, *Catlin Ins. Co. (UK) Ltd.* v. *Bernuth Lines Ltd.*, 12-1773-CV,

2013 WL 406273 (2d Cir. Feb. 4, 2013) (stating prima facie standard in context of 4(k)(2) analysis).

d. Due Process Analysis

If this Court determines that statutory jurisdiction—either under Rule 4(k)(1) or Rule 4(k)(2)—is proper, it must finally ask whether such jurisdiction comports with due process.

1. Minimum Contacts

In doing so, the Court first asks whether sufficient minimum contacts exist between that nonresident defendant and either New York (under Rule 4(k)(1)) or the United States generally (under Rule 4(k)(2)), such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945); *Worldwide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 291 (1980).

The minimum contacts necessary to comport with the New York jurisdictional statutes, C.P.L.R. §§ 301 and 302, necessarily comport with the Due Process Clause since New York law requires a greater showing of minimum contacts than would be required by the Due Process Clause alone. See *Licci I*, 673 F.3d at 60–61 ("The New York long-arm statute does not extend in all respects to the constitutional limits established by *International Shoe*.") Thus, the "purposeful availment" analysis for specific jurisdiction under C.P.L.R. 302(a) satisfies a similar purposeful availment analysis under the Due Process Clause. See *Burger King Corp.*, 471 U.S. at 472 (setting forth purposeful availment standard under the Due Process Clause).

In contrast, the "minimum contacts" prong for federal question personal jurisdiction under Rule 4(k)(2) focuses

on whether the defendant "has the requisite aggregate contacts with the United States" as a whole. *Eskofot A/S* v. *E.I. Du Pont De Nemours & Co.*, 872 F. Supp. 81, 87 (S.D.N.Y. 1995). The Second Circuit has held that those contacts may be satisfied by "(1) transacting business in the United States, (2) doing an act in the United States, or (3) having an effect in the United States by an act done elsewhere." See *Id.* at 87 (citing *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F.2d 1326, 1340 (2d Cir. 1972)).

2. Reasonableness Factors

Lastly, if the defendant has sufficient minimum contacts, the Court must also determine that the exercise of personal jurisdiction over this defendant is reasonable. *Chloe*, 616 F.3d at 172–73; *MacDermid*, 702 F.3d at 730–31. The Supreme Court has established five factors this Court must consider in order to determine whether the exercise of personal jurisdiction is reasonable:

1. The burden on the defendant;
2. The interests of the forum State;
3. The plaintiffs' interests in obtaining relief;
4. The interstate judicial system's interest in obtaining the most efficient resolution of controversies; and
5. The shared interest of the Several States in furthering substantive social policies.

Asahi Metal Indus. Co. v. *Superior Court*, 480 U.S. 102, 113–14 (1987); *Chloe*, 616 F.3d at 172–73.

The mere fact that a defendant is foreign and would have to travel to New York is insufficient to defeat a finding of reasonableness. See *MacDermid*, 702 F.3d at 730–31 (holding that the fact that defendant was Canadian

was insufficient to defeat minimum contacts; the defendant's act of accessing a computer server located within New York from outside the state satisfied the minimum contacts requirement); *Kernan* v. *Kurz-Hastings., Inc.*, 175 F.3d 236, 244 (2d Cir. 1999) (holding that burden on Japanese defendant to defend suit in the United States was insufficient to overcome its minimum contacts-particularly in light of the ease of modern travel and communication).

e. Personal Jurisdiction over UBAE

UBAE asserts that plaintiffs are unable to make out a prima facie basis for personal jurisdiction. This Court disagrees. Plaintiffs have alleged sufficient facts which, when analyzed against the legal framework set forth above, leave no doubt that either specific jurisdiction over UBAE exists pursuant to C.P.L.R. 302(a)(1) or, in the alternative, that jurisdiction exists under the federal question provision, Rule 4(k)(2).

1. Specific Jurisdiction

Plaintiffs base personal jurisdiction as to UBAE on the New York long-arm statute, C.P.L.R. § 302. They suggest that jurisdiction is proper under the "transacting business" provision, § 302(a)(1), as well as the provisions for personal jurisdiction based on tortious acts committed within New York, C.P.L.R. § 302(a)(2), and those committed without New York, C.P.L.R. § 302(a)(3)(ii). The Court need not address the tortious acts basis for specific jurisdiction since plaintiffs clearly make out a prima facie case of "transacting business" jurisdiction.

While the parties do not agree as to how and why certain transactions relating to the bonds were structured and occurred as they did, the allegations in the complaint, UBAE's factual concessions contained in the Matranga

declaration (ECF No. 95), and the materials presented in the Vogel Declaration in opposition to UBAE's Rule 12(b)(2) motion (ECF No. 323) are sufficient to meet the standard for "transacting business" in New York.

UBAE admits that a series of acts occurred relating to the Markazi Bonds—but it argues that those acts all occurred outside of the United States, and further, that UBAE has no presence in the United States at all. (See Matranga Decl. ¶ 3 ("UBAE did not advertise, solicit business, or market its services in New York, or anywhere in the United States.") In this regard, UBAE asserts that it followed Bank Markazi's directive to sell two of the Markazi Bonds securities with a combined face value of $250 million. (Matranga Reply Decl. ¶ 7.) Though the securities were physically held in New York, UBAE would work exclusively from Luxembourg to buy the $250 million in securities from Bank Markazi and negotiate a higher price on the open market. (*Id.* ¶ 8.) It would then pocket the difference between the two as its fee. (*Id.*)

While the structure of the transaction did not cause UBAE to send personnel into New York, UBAE ignores the crucial fact that the bonds were physically located in New York at the time of sale; therefore, by definition UBAE engaged in sales transactions for bonds physically located in New York. In addition, plaintiffs present evidence from UBAE's own sales records that indicate that UBAE distributed sales proceeds and interest payments from the Markazi Bonds via its correspondent account at HSBC in New York. (See Decl. of Liviu Vogel in Opp. to UBAE Mot. to Dismiss ("Vogel UBAE MTD Decl.") Exs. C–F.)

This pathway of proceeds through New York is enough to constitute § 302 "transacting business". N.Y.

C.P.L.R. § 302(a)(1). The fact that UBAE may have been making all of the arrangements relating to the sales outside of the U.S. cannot erase the fact that the bonds and proceeds relating thereto physically transferred in New York. UBAE used its correspondent account to process the proceeds of the sale because it offered the stability and security of the New York banking laws—purposeful availment analogous to that in *Licci II*.

Finally, UBAE argues that since it was unaware of plaintiffs' judgment until June 2008, there cannot be any causal connection between its March 2008 actions and trying to avoid that judgment. This argument also fails. The New York long-arm statute provides that an entity or its agent may engage in conduct which supports jurisdiction. See, *e.g.*, *Kreutter* v. *McFadden Oil Corp.*, 71 N.Y.2d 460, 467 (N.Y. 1988) (finding C.P.L.R. § 301(a)(1) jurisdiction proper where corporation never entered New York, but its agent engaged in "purposeful activities in this State in relation to his transaction for the benefit of and with the knowledge and consent [of the corporation] and that they exercised some control over [the agent]").

Even if UBAE itself was not transacting business in New York, its agents most certainly were. Plaintiffs have sufficiently alleged, and the facts in the record support, that Bank Markazi and Clearstream were aware of plaintiffs' judgments at the time that UBAE was engaged to open an account and engage in a sale transaction on behalf of Bank Markazi. (SAC ¶¶ 13, 15, 24, 37, 41.) UBAE's own concession that Clearstream was acting on its behalf in the United States and its more recent statements in opposition to plaintiffs' motion for partial

summary judgment[5] are sufficient to support an agency relationship. (See Matranga Reply Decl. ¶¶ 8–10.)

2. Rule 4(k)(2) Jurisdiction

By arguing that it has no presence in the United States and did not engage in transactions in New York sufficiently related to the instant dispute to constitute "transacting business" jurisdiction, however, UBAE has in fact established the necessary predicate for personal jurisdiction pursuant to Fed. R. Civ. P. 4(k)(2). It is undisputed that this case raises federal claims—the execution of the judgments obtained by plaintiffs is governed by federal laws FSIA, TRIA, E.O. 13599, and 22 U.S.C. §8772. Rule 4(k)(2) applies to just such situations.[6] UBAE argues strenuously that it has no presence in the United States that would subject it to general personal jurisdiction in any state. (See Matranga Decl. ¶ 4.) Provided that exercising jurisdiction over UBAE anywhere in the United States comports with due process, in personam jurisdiction in this Court is proper. Fed. R. Civ. P. 4(k)(2).

3. Due Process Analysis

Indeed, under the New York long-arm statute—and thus under the Due Process Clause itself—there are sufficient minimum contacts (under *International Shoe* and

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[5] In its summary judgment opposition brief, UBAE admits both that it "has not asserted a legally cognizable interest in the restrained bonds" and that "UBAE is not in 'possession' or 'custody' of any of the restrained bonds." (UBAE SJ Opp. Br. at 2.)

[6] As stated above, Rule 4(k)(2) provides: "For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws." Fed. R. Civ. P. 4(k)(2).

its progeny) between New York / the United States and UBAE to exercise jurisdiction, and doing so would undoubtedly be reasonable.

First, UBAE itself has conceded that it uses the services of its correspondent bank on a daily basis to manage its U.S. dollar holdings. (See Matranga Decl. ¶¶ 5–6.) In addition, its actions with respect to the bonds were aimed at New York—and it caused transfers between a number of New York financial institutions in order to complete (*e.g.* the FBNY, DTC, Citibank, JP Morgan Chase, just to name those as to which even UBAE cannot assert a lack of involvement).

The *Asahi* "reasonableness" factors are also met both for jurisdiction pursuant to Rule 4(k)(2) and/or pursuant to New York's long arm statute. The burden on UBAE of defending this suit is minimal in comparison to the interests of New York and the United States in providing a forum to adjudicate disputes over bond proceeds physically located in New York. In addition, plaintiffs have a strong interest in—and right to—seek relief from Iran. That relief would be stymied if UBAE, acting as agent of Bank Markazi, was able to take those precise acts Bank Markazi would have taken with respect to the Blocked Assets present in New York, but evade jurisdiction here. Likewise, bringing UBAE before this court will enable efficient resolution of plaintiffs' claims as to these assets in a single proceeding, putting an end to the years of disjointed litigation and delays. Finally, only by subjecting UBAE to this Court's jurisdiction will the Court be able to enforce the policies behind the anti-terrorism provisions of FSIA, TRIA and Section 8772—as Congress clearly intended.

As the requirements of the Due Process Clause are met with respect to UBAE, this Court therefore finds

that plaintiffs make out a prima facie case of specific personal jurisdiction under Fed. R. Civ. P. 4(k)(1)(A), incorporating C.P.L.R. § 302(a). In the alternative, Rule 4(k)(2) jurisdiction is proper. UBAE's Rule 12(b)(2) motion to dismiss is denied.

f. Analysis regarding Clearstream

Clearstream's motion to dismiss for lack of personal jurisdiction also fails. As an initial matter, it is rather remarkable that Clearstream has spent the time to make such an argument given the existence and persistence of its New York operations supportive of its overall business. The Court finds that there are bases to suggest both general jurisdiction and specific jurisdiction over Clearstream under Rule 4(k)(1).[7]

Clearstream is clearly doing business in New York and thus subject to general jurisdiction under C.P.L.R. § 301. For such a determination it is unnecessary that Clearstream conduct all of its business in New York—or even that the specific facts relating to the issues in this case relate to specific acts taken in New York. See *Gelfand* v. *Tanner Motor Tours. Ltd.*, 385 F.2d 116, 121 (2d Cir. 1967) ("[A] foreign corporation is doing business in New York 'in the traditional sense' when its New York representative provides services beyond 'mere solicitation' and these services are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services."). It is enough that as a general matter it is in fact

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[7] A basis for Rule 4(k)(2) jurisdiction may also exist over Clearstream, but—unlike UBAE—Clearstream has not alleged that it cannot be subject to general personal jurisdiction in any U.S. jurisdiction—a prerequisite for 4(k)(2) jurisdiction.

doing business in New York. This is evidenced by the presence of a Clearstream office in New York, which employs Clearstream employees for the purpose of obtaining and also supporting business for Clearstream Luxembourg from New York. As the evidence demonstrates, Clearstream in New York is not merely soliciting business—it provides support services for its Luxembourg operations and is part of Clearstream's overall strategy to "provide[] global services to the securities industry . . . close to its customers in all major time zones" (See Letter of Liviu Vogel to Hon. Barbara S. Jones Ex. 1 at 2, Aug. 14, 2009, ECF No. 178.) These activities demonstrate the "permanence and continuity" required for § 301 general jurisdiction. *Cf. Hoffritz for Cutlery, Inc.* v. *Amajac, Ltd.*, 763 F.2d at 58 (finding no general § 301 jurisdiction where nonresident defendant lacked an office in New York, did not solicit business in the state and did not have bank accounts, other property or employees in the state).

However, even if this Court were to analyze whether there is a sufficient basis for long-arm jurisdiction over Clearstream Luxembourg, the answer would still clearly—and resoundingly—have to be "yes." Clearstream Luxembourg's contacts with New York relate directly to plaintiffs' allegations regarding the Markazi Bonds that were maintained at the FBNY and DTC in New York. Even if this Court were to ignore the presence of Clearstream's office on Broad Street in New York, the fact that Clearstream Luxembourg engaged in a series of financial transactions over an extended period of time with regard to these New York based bonds would require a finding of sufficient "transacting business" for long-arm jurisdiction under C.P.L.R. § 302(a)—and, necessarily,

also a finding of sufficient minimum contacts to satisfy due process.

That transaction of business is clear from Clearstream's innumerable acts to maintain its New York-based Citibank account. It has repeatedly communicated with Citibank about the Blocked Assets and arranged for various transactions with Citibank. (See, *e.g.*, Decl. of Liviu Vogel in Opp. to Clearstream's Mot. to Vacate Restraints ("Vogel Vacate Restraints Opp. Decl.") Exs. 4, 16, ECF No. 299.) It is irrelevant whether its New York office had anything to do with those actions. It is enough that Clearstream's Luxembourg operations repeatedly had contacts with New York by virtue of its account at Citibank—and that the account has, at all relevant times, been connected with the Blocked Assets. See *Licci II*, 2012 WL 5844997 ("[T]he 'arise-from' prong [of C.P.L.R. § 302(a)(1)] limits the broader 'transaction-of-business' prong to confer jurisdiction only over those claims in some way arguably connected to the transaction.").

Finally, applying the *Asahi* factors suggests that exercising personal jurisdiction with respect to Clearstream is reasonable. The interests with respect to Clearstream are nearly identical to those for UBAE. And the burden on Clearstream to defend a suit in this Court is minimal given Clearstream's continuous and systematic contacts with New York.

Clearstream is subject to this Court's general personal jurisdiction and, in the alternative, plaintiff makes out a prima facie case of "transacting business" jurisdiction under the New York long-arm statute. Clearstream's Rule 12(b)(2) motion to dismiss is denied.

B. Bank Markazi's Motion to Dismiss

Bank Markazi has moved to dismiss plaintiffs' claims on the basis of a lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1). Bank Markazi argues that (1) plaintiffs' TRIA § 201 claim raises a non-justiciable political question, (2) that the assets are technically not "of"—*i.e.*, not owned by—Bank Markazi, (3) that the situs of the bonds is outside the jurisdiction of this Court, (4) that execution would violate U.S. obligations under the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran ("Treaty of Amity"), Aug. 15, 1955, 8 U.S.T. 899, and finally (5) that the assets are immune central banking assets under FSIA § 1611(b)(1).

i. Rule 12(b)(1) Standard of Review

Federal district courts are courts of limited jurisdiction. Challenges to a court's subject matter jurisdiction are challenges to the ability of the Court to entertain an action in the first instance. The party invoking federal subject matter jurisdiction bears the burden of establishing that jurisdiction exists by a preponderance of the evidence. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Makarova* v. *United States*, 201 F.3d 110, 113 (2d Cir. 2000). Determining the existence of subject matter jurisdiction is a threshold inquiry; a case is properly dismissed under Fed. R. Civ. P. 12(b)(1) when the district court lacks the constitutional power to adjudicate it. See *Arar* v. *Ashcroft*, 532 F.3d 157, 168 (2d Cir. 2008).

A defendant may challenge either the legal or factual sufficiency of plaintiffs' assertion of jurisdiction. *Nat'l Union Fire Ins. Co. of Pittsburgh* v. *BP Amoco PLC*, 319 F. Supp. 2d 352, 371 (S.D.N.Y. 2004). In determining whether this Court has subject matter jurisdiction over plaintiffs' actions, it must accept as true all material fac-

tual allegations in the SAC, but because jurisdiction must be shown affirmatively, this Court must refrain from drawing inferences favorable to the parties asserting jurisdiction (here, plaintiffs). See *APWU* v. *Potter*, 343 F.3d 619, 623 (2d Cir. 2003). The Court can resolve disputed factual issues by reference to evidence outside of the pleadings. See *Flores* v. *Southern Peru Copper Corp.*, 343 F.3d 140, 161 n.30 (2d Cir. 2003); see also *Makarova*, 201 F.3d at 113.

ii. Analysis as to Bank Markazi

An analysis of the facts regarding the actions and assets of Bank Markazi in this district leaves no serious doubt that this Court has subject matter jurisdiction.

1. Political Question

Courts lack authority to decide non-justiciable political questions. *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1427 (2012). Bank Markazi argues that the European Union's ("E.U.") blocking regime has frozen all assets of the Central Bank of Iran and thereby created a non-justiciable political question with respect to any action this Court might take under U.S. law that would impact the holders of the Blocked Assets under European law.

In 2010, the E.U. enacted regulations that froze "all funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in [certain annexes]." See Council Regulation (EU) No. 961/2010, Article 16(1)-(3). These regulations also provide that "no funds or economic resources shall be made available, directly or indirectly, to or for the benefit of the natural or legal persons, entities or bodies listed in [certain annexes]." *Id.*

Bank Markazi was not listed on the original annexes. However, on January 24, 2012—just prior to the issuance of E.O. 13599 in the United States—it was added. See Council Implementing Regulation (EU) No. 54/2012 of January 23, 2012, Article 1.1 (Annex VIII ¶ 51).

In addition, article 23(2) of an EU regulation passed in March 2012 consolidated previous regulations and explicitly maintained the freeze on assets of the Central Bank of Iran. Council Regulation (EU) No. 267/2012, Arendt III ¶¶ 51–52 & Exh. J. The freezing of funds prevents "any move, transfer, alteration, use of, access to, or dealing in funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination, or other change that would enable the funds to be used, including portfolio management." *Id.*

According to Bank Markazi, the EU regulations change everything. It argues that, even assuming that the Blocked Assets are assets "of" Bank Markazi (which, as discussed below, it argues is incorrect), the EU blocking regime presents direct competition with E.O. 13599—competition that implicates foreign relations concerns and must be resolved by the political—not judicial—branches of government. (See Bank Markazi Reply Mem. in Support of Mot. to Dismiss ("Markazi MTD Reply") at 3–4 (adopting Clearstream Reply Memorandum in Support of its Renewed Mot. to Vacate Restraints ("Clearstream Mot. to Vacate Reply") at 9–16, ECF No. 220).)

The facts giving rise to this conflict are both simple and technical: a debit to the Blocked Assets in Clearstream's Omnibus Account at Citibank in New York by virtue of turnover would require a corresponding debit in

Clearstream's Luxembourg account—constituting a direct violation of the EU Regulation.[8]

In connection with this motion only, in order to allow the Court to decide the issue, Bank Markazi affirmatively makes the following factual assumptions: that the underlying beneficial owner of the Blocked Assets is Bank Markazi, that Bank Markazi's transfer to UBAE has been "undone" such that the assets remain in an account between Clearstream and Bank Markazi, that this Court can exercise personal jurisdiction over Clearstream in New York, and that all of the other actions by other banks and issuers occurred in New York. (See *Id.* at 4–6 (argument adopted by Bank Markazi as explained in Clearstream brief).)

2. Political Question Analysis

The E.U. and U.S. blocking regimes are not here in "competition", and they do not create a non-justiciable political question.

Whether or not a question is "political," and therefore non-justiciable, is determined by reference to six factors:

> [(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an [initial] policy determination of a kind clearly for non-judicial discretion; or [(4)] the impossibility of the court's undertaking independent resolution without expressing lack of respect due coordinate branches of

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[8] Markazi—via Clearstream—argues that the debit would constitute a "change in volume, amount, location, ownership, possession, character, [or] destination" of the Blocked Assets. (See Clearstream Vacate Restraints Reply Br. at 13.)

> government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. *Carr*, 369 U.S. 186, 217 (1962); see also *767 Third Ave. Assocs.* v. *Consulate Gen. of Socialist Fed. Republic of Yugoslavia*, 218 F.3d 152, 160 (2d Cir. 2000).

Bank Markazi argues that the EU and U.S. blocking regimes raise important questions of foreign relations, lack judicially manageable standards, and generally raise *Baker* v. *Carr* concerns. This Court disagrees.

To the extent that the differential treatment of the assets of terrorist states raises foreign relations concerns, the executive and legislative branches have demonstrated a clear intent that not only permits but affirmatively encourages the judiciary to resolve the issues surrounding restraint and turnover of such assets. As set out above, the sheer multitude of statutory and executive pronouncements directly and unquestionably applicable to the motions before this Court makes any political question argument baseless.

Bank Markazi can point to no aspect of the Constitution that commits the treatment of a hypothetical turnover of U.S.-based assets by a foreign legal system to a "coordinate political department" Instead, Congress and the President agree that it is the province of the judiciary to determine the effect, if any, of these competing regimes: provisions of the FSIA, as described above, enable courts to enforce judgments against sovereigns when those judgments relate to acts of terrorism; TRIA allows a court to execute against blocked assets of a terrorist party; E.O. 13599 provides that assets of Iran and the Central Bank of Iran are blocked; the SDN list indi-

cates that Iran and Bank Markazi are on the list of blocked terrorist organizations; and finally, the most recent pronouncement, 22 U.S.C. § 8772, specifically provides that the assets at issue in this very lawsuit are subject to execution and attachment in aid of execution.

Nor can there be a suggestion of a lack of judicially manageable standards to resolve the potential friction between the U.S. and E.U. regimes. Congress enacted 22 U.S.C. § 8772 in August 2012—well after March 2012, when the EU promulgated the last of its blocking Regulations referred to by Clearstream. Congress certainly could have altered the statute in light of the E.U. regulations; it chose not to do so.

Instead, § 8772 gives this Court clear standards to rule on the questions before it with respect to these very assets. The statute spells out specific requirements for judicial determinations as to whether a non-Iranian entity has a constitutionally protected interest in the assets, or holds equitable or beneficial title or interest in the assets. See 22 U.S.C. § 8772(a)(2). Together, these various statutes and orders require this Court to find that it should rule on the very questions here presented. In addition, of course, it cannot be that a court must refrain from adjudicating a dispute where the potential exists for a foreign legal regime to impose penalties on a litigant based on the U.S. court's decision. Foreign ramifications alone do not create a non-justiciable political question. And they do not here.

3. Ownership of the Blocked Assets

Bank Markazi next argues that the Blocked Assets are not assets "of" Bank Markazi. Bank Markazi states a

showing of ownership is required for subject matter jurisdiction under TRIA § 201(a).[9]

Even if Bank Markazi were correct regarding TRIA (and it is not), that does not mean this court lacks subject matter jurisdiction. The 2012 Act, § 8772, specifically trumps "any other provision of law" and specifically permits execution on the assets specifically at issue in this litigation, rendering moot any ambiguity in TRIA. 22 U.S.C. § 8772(a)(1).

Even in the absence of § 8772, however, this Court finds that TRIA provides for subject matter jurisdiction with respect to Bank Markazi. It is true that TRIA authorizes execution of assets "of" a terrorist party. See 28 U.S.C. § 1610 n. (2006) ("[I]n every case in which a person has obtained a judgment against a terrorist party the blocked assets of that terrorist party shall be subject to execution ") (emphasis added). In the case of the Blocked Assets here at issue, Bank Markazi is the only owner. Clearstream—in whose name the Citibank account is listed—never claims it "owns" the assets. UBAE argues it has acted with respect to the assets merely on behalf of Bank Markazi. (See UBAE SJ Opp. Br. at 2 (stating UBAE "has not asserted a legally cognizable interest in the restrained bonds" and that "UBAE is not in 'possession' or 'custody' of any of the restrained bonds"); Matranga Reply Decl. ¶¶ 7–10.) Citibank states that it is a neutral stakeholder. (See Letter of Sharon L. Schneier to the Hon. Katherine B. Forrest, Dec. 14, 2012, ECF No. 300).

Bank Markazi has repeatedly conceded at a variety of times in connection with this litigation—and Clearstream

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[9] Section 201(a) refers to attachment only of the "blocked assets of th[e] terrorist party" (emphasis added).

has stipulated for the limited purpose of resolving its motion to vacate the restraints, *infra*—Bank Markazi is "the" sole beneficial owner of the assets.[10]

Bank Markazi suggests that Judge Cote's decision in *Calderon-Cardona* v. *JPMorgan Chase Bank, N.A.*, 867 F Supp. 2d 389, 400 (S.D.N.Y. 2011), counsels a different result.[11] This Court disagrees.

The Court in *Calderon-Cardona* held that electronic funds transfers ("EFTs") allegedly related to North Korea were not subject to attachment under TRIA and the FSIA. It is distinguishable in several respects: first, the *Calderon-Cardona* decision related to mid-stream EFTs—rapid funds transfers between a sending and receiving bank, processed by an intermediary bank—rather than the static proceeds of financial instruments.

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[10] Bank Markazi has stated that "Over $1.75 billion in securities belonging to Bank Markazi are frozen in custodial Omnibus Account at [Citibank]"; that the "Restrained Securities are the property of Bank Markazi, the Central Bank of Iran", that the "aggregate value of the remaining bond instruments, i.e. the Restrained Securities that are the property of Bank Markazi and the subject of the Turnover Action—is thus $1.753 billion"; that the "Restrained Securities are the property of a Foreign Central Bank ."; that the "Restrained Securities are presumed to be the property of Bank Markazi"; and "the Restrained Securities are prima facie the property of a third party, Bank Markazi . " (See Bank Markazi's First Mem. of L. in Support of its Mot. to Dismiss the Am. Compl., May 11, 2011, ECF No. 18 ("Markazi's First MOL"), at 1, 5, 9, 10, 36 (emphases added).) In addition, two officers of Bank Markazi have sworn under penalty of perjury that the Blocked Assets are the "sole property of Bank Markazi and held for its own account." (Aff. of Gholamossein Arabieh ¶ 2, Vogel Decl. Ex. J, Oct. 17, 2010, ECF No. 210; Aff. of Ali Asghar Massoumi ¶ 2, Vogel Decl. Ex. K, Oct. 17, 2010, ECF No. 210).

[11] As with the political question arguments, Markazi expressly adopted this argument from Clearstream's memoranda in support of its motion to vacate the restraints. (See Markazi MTD Reply at 5.)

Id. A significant question in *Calderon-Cardona* was whether the EFTs were "owned" by North Korea at the time of the transfers. *Id.* In finding no such ownership, the Court noted Second Circuit precedent holding that—according to New York law—"EFTs are neither the property of the originator nor the beneficiary while briefly in the possession of an intermediary bank." *Id.* at 400 (citing *Shipping Corp. of India Ltd.* v. *Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 71 (2d Cir. 2009)). Even if North Korea was the originator or beneficiary, then, it could not be the "owner" of the EFTs for the purposes of TRIA. *Id.* The Court concluded that "[t]he petitioners have pled no facts indicating that North Korea has an interest in any of the blocked accounts that exceeds that of an originator or beneficiary in a midstream EFT." *Id.* at 407.

In contrast, here, nearly $2 billion in bond proceeds is sitting in an account in New York at Citibank—there are no fleeting or ephemeral interests like those that occur in EFTs. The only entity with any financial interest in the funds in the account is Bank Markazi—as it has stipulated for the purposes of this motion, but also as it has repeatedly asserted. Clearstream has no such interest; UBAE's interest is analogous to that of Clearstream (and, as it states, it has no legally cognizable interest). Any possible contrary interpretation under state law is expressly preempted by the express language of § 8772.

Accordingly, on these facts, this Court need not choose whether it is necessary to follow the *Calderon-Cardona* rationale or those of the other cases in this District involving EFTs. See, *e.g.*, *Hausler* v. *JP Morgan Chase Bank, N.A.* (hereinafter "Hausler I"), 740 F Supp. 2d 525 (S.D.N.Y. 2010); *Hausler* v. *JP Morgan Chase Bank, N.A.* (hereinafter "Hausler II"), 845 F Supp. 2d 553

(S.D.N.Y. 2012); *Levin* v. *Bank of N.Y.*, No. 09 Civ. 5900, 2011 WL 812032 (S.D.N.Y. Mar. 4, 2011). All of the EFT cases attempt to answer whether transfers between financial institutions that pass through a banking institution within the U.S. are nonetheless "assets of" the terrorist party to whose benefit the transfers may ultimately inure. See, *e.g.*, *Hausler I*, 740 F. Supp. 2d at 526; *Hausler II*, 845 F Supp. 2d at 558–561; *Levin*, 2011 WL 812032, at *11. Only one of the cases—*Levin*—dealt with any proceeds of financial instruments; the Court in *Levin* issued a turnover order for those assets. See *Levin*, 2011 WL 812032, at *20–21 (finding no bar under New York law to turnover of non-EFT accounts allegedly owned by instrumentalities of Iran).

4. Location of the Blocked Assets and Treaty of Amity

Markazi's remaining arguments—(1) that the bonds are not located in the United States and therefore cannot be executed upon under FSIA and (2) that blocking the assets violates U.S. treaty obligations—fail for the same reason: 22 U.S.C. § 8772 obviates any need for this Court to rely on TRIA or the Treaty of Amity for resolution of this motion.

However, even if this Court were to ignore § 8772, the arguments nonetheless fail.

First, Bank Markazi argues that the Markazi Bonds are located in Luxembourg and thus outside this Court's jurisdiction. (See Markazi MTD Reply Br. at 6.) They cite this Court's decision in a related case, *Bank of Tokyo–Mitsubishi, UFJ, Ltd. New York Branch* v. *Peterson*, No. 12 Civ. 4038(BSJ), 2012 WL 1963382, at *2 (S.D.N.Y. May 29, 2012), for the proposition that assets held outside the United States are not subject to execution.

This "extra-territoriality" argument assumes that the Blocked Assets are located outside of the United States. This argument is sophistry: the Blocked Assets are located in a bank account at Citibank in New York (additional assets relating to the now liquidated $250 million in Markazi Bonds do not appear to be in New York, but their location is irrelevant to the resolution of this motion). It may well be that there are account entries on the books of entities in Europe—such as Clearstream Luxembourg—relating to the Blocked Assets. But the mere fact that the account at Citibank is listed under the Clearstream and UBAE names does not alter the fact that those entities are agents of Bank Markazi. Nor do mere book entries in Luxembourg transform the Citibank New York account into assets located in Luxembourg.[12]

In addition, the Treaty of Amity provides no barrier to subject matter jurisdiction. Bank Markazi argues that Arts. III.2 and IV.1 of the Treaty entitle it to separate juridical status from Iran and, as such, its assets cannot be seized to satisfy a judgment against the sovereign state. (Markazi MTD Br. at 22.)

The treaty is inapplicable. First, irrespective of any interpretation of the language of the Treaty, in *Weinstein* v. *Islamic Republic of Iran*, 609 F.3d 43, 53 (2d Cir. 2010) the Second Circuit stated that the phrase "notwithstanding any other provision of law" in FSIA effectively trumps any conflicting law. As to the textual interpretation of the Treaty itself, the *Weinstein* Court held that the Treaty of Amity provisions cited by Bank Markazi are inapposite; the purpose behind the Treaty of Amity

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[12] This is particularly true in light of 22 U.S.C. § 8772, its preemption of any contrary law, and its required narrow judicial determinations.

was "simply to grant legal status to corporations of each of the signatory countries in the territory of the other, thus putting the foreign corporations on equal footing with domestic corporations." *Id.* at 53. There is no basis to find that the Treaty was intended to be used or has been used to aid instrumentalities of foreign governments to circumvent congressional acts or authorized legal actions.

Lest any ambiguity remain, Congress inserted an additional "notwithstanding" clause in 22 U.S.C. § 8772(a)(1). That clause evinces clear Congressional intent to abrogate treaty language inconsistent with FSIA and § 8772. *Id.* (noting Circuit Courts have interpreted similar "notwithstanding" clauses to abrogate treaty language). To do otherwise would render FSIA a dead letter—something Congress and the President clearly did not intend.

Thus, the plain language of the Treaty of Amity renders it inapplicable to the Blocked Assets and, further, Congress has abrogated any application of the Treaty in the FSIA context.

5. Central Bank Immunity

Bank Markazi's final set of arguments assert FISA § 1611(b)(1) immunity from attachment for assets used for central banking purposes. FSIA § 1611(b)(1) provides that "the property . . of a foreign central bank or monetary authority held for its own account" is entitled to immunity from attachment and execution. The Court only has jurisdiction to hear a turnover action for sovereign assets where a valid exception to FSIA exists; the central banking rule negates any FSIA exception. See *Aurelius Capital Partners, LP* v. *Republic of Argentina*, 584 F.3d 120, 129–30 (2d Cir. 2009) (citing FSIA § 1609).

Again, even if the Blocked Assets were, in fact, "held for [the central bank's] own account," TRIA § 201(a), E.O. 13599, and 22 U.S .C. § 8772 expressly preempt any immunity.

Congress is presumed to be aware of its previous enactments when it passes a new statute. See *Vimar Seguors y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 554 (1995) (citing *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 696–699 (1999)). TRIA's "notwithstanding" clause—enacted well after § 1611(b) was adopted in 1976—thus preempts central bank immunity to the extent it would apply. TRIA § 201(a). As the Supreme Court has observed, "a clearer statement" of intent to supersede all other laws than a "notwithstanding clause" is "difficult to imagine." *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10, 18 (1993).

Beyond the statutory language, E.O. 13599 suggests that Bank Markazi is not engaged in activities protected by § 1611(b), and thus is not entitled to immunity. The Order makes a finding that Bank Markazi's assets are blocked "in light of the deceptive practices of [Bank Markazi] and other Iranian banks to conceal transactions of sanctioned parties and the continuing and unacceptable risk posed to the international financial system by Iran's activities " E.O. 13599. This executive determination suggests that the activities of Bank Markazi are not central banking activities that would provide § 1611(b) immunity. See *NML*, 652 F.3d at 172 (setting forth functional test for central banking activities).

Finally, § 8772 also applies "notwithstanding any other provision of law, including any provision of law relating to sovereign immunity[.]" 22 U.S.C. § 8772(a)(1) (emphasis added). Assuming—as the Court finds below—that §8772 is valid, it must also find no central bank immunity.

In light of the above conclusions, there is no doubt that this Court has subject matter jurisdiction with respect to claims asserted against Bank Markazi. Its motion to dismiss is denied.

IV. MOTION TO VACATE RESTRAINTS

A. Background and Procedural History

As set forth above, in 2008, plaintiffs obtained writs of attachment and execution against an account that Clearstream maintained at Citibank, imposing restraints—restrictions against the transfer or disposal of the assets in that account. That account was used to manage proceeds connected to the Markazi Bonds.

In June 2008, Clearstream challenged the restraints and this Court held an evidentiary hearing. At that hearing, Clearstream presented evidence that "at one time Clearstream's [customer, the Central Bank of Iran ("Bank Markazi"), was the underlying beneficial owner of the securities entitlements identified in the restraints, but that in February 2008] Bank Markazi [transferred all but one of its securities entitlements to the bonds identified in the restraints from its account at Clearstream to an account with another Clearstream customer], Banca UBAE S.p.A." (See Clearstream's Consol. Mem. in Supp. Of Mot. To Vacate Restraints ("Clearstream Vacate Br.) at 3.) At that hearing, a Clearstream employee testified that he did not know whether Bank Markazi remained the beneficial owner of the securities entitlements. (*Id.*) At the conclusion of the hearing, Judge Koeltl lifted the restraints as to the two bonds that had been sold to customers other than UBAE (valued at approximately U.S. $250 million). The restraints were not lifted as to the remaining assets held in Clearstream's Omnibus Account at Citibank. (*Id.* at 4.)

At a June 27, 2008, hearing, Clearstream moved again to vacate the remaining restraints—this time pursuant to the Uniform Commercial Code ("UCC"), § 8-112(c). Clearstream argued that neither it nor Citibank was a proper "garnishee" under the provision. Clearstream further argued that the restraints should be lifted since the securities entitlements were Clearstream's and not Bank Markazi's. (*Id.*)

On June 23, 2009, Judge Barbara Jones held that Clearstream was not a proper garnishee under § 8-112(c) of the UCC because all but one of the securities at issue were held at Clearstream in the name of UBAE, rather than Bank Markazi. (See Order, *Peterson et al.* v. *Islamic Republic of Iran et al.* (S.D.N.Y. June 23, 2009), ECF No. 171.) Bank Markazi, as an instrumentality of Iran, was the only proper garnishee under UCC § 8-112(c). The Order noted that it was possible, however, that the transfer of the Bank Markazi securities to the UBAE account was fraudulent and that Bank Markazi therefore remained the true holder of the securities. (*Id.*) She held that the restraints would remain in place pending a further judicial determination as to (1) whether such transfers could be fraudulent as a matter of law, (2) if they were, in fact, fraudulent, and (3) if Clearstream was (or could be made) a proper garnishee. (*Id.*)

The parties then briefed whether a judicial determination that the conveyance was fraudulent would alter the UCC analysis and whether Clearstream could in any event be a proper garnishee. (See Letter of Frank Panopoulos to Hon. Barbara S. Jones (hereinafter "Clearstream Restraints Br."), Aug. 14, 2009, ECF No. 181; Letter of Liviu Vogel to Hon. Barbara S. Jones (hereinafter "Pls.' Restraints Br."), Sept. 19, 2009, ECF No. 183). In the same briefing, plaintiffs also raised alterna-

tive theories supporting turnover of the same assets. (Pls.' Restraints Br. at 4–6.) The Court never issued a subsequent ruling addressing those arguments. Those arguments were then re-briefed and consolidated into Clearstream's motion to vacate now pending before this Court and resolved herein. (See Renewed Mot. To Vacate Restraints, ECF No. 174.)

Clearstream's motion to vacate initially relied upon the following five arguments:

- Clearstream is not a proper garnishee under UCC § 8-112(c);
- According to UCC § 8-110, Bank Markazi's assets or interests are located in Luxembourg and not this district and must be restrained there;
- Common law "situs" rules are not applicable as a basis to restrain or turnover the assets;
- The restrained assets are not "Blocked Assets" under TRIA;
- Equitable relief is unavailable to restrain and turnover the blocked assets.

In its reply memorandum on this motion, Clearstream adds a sixth argument—that the competing E.U. and U.S. blocking regimes present a non-justiciable political question, the same argument the Court rejected, *supra*, with respect to Bank Markazi's motion to dismiss.

In response to this series of arguments, plaintiffs contend that (1) the EU Regulation does not create a non-justiciable political question; (2) the UCC is inapplicable to the questions before this Court because TRIA preempts conflicting state law and the Blocked Assets are therefore subject to both the restraints and to turnover; (3) TRIA and E.O. 13599 render the situs argument inapplicable; and (4) that the restrained assets are desig-

nated as Blocked Assets. According to plaintiffs, New York's CPLR permits enforcement of plaintiffs' judgments against the cash held in the Omnibus Account.

B. Analysis

"Enough is enough" is the reductionist version of plaintiffs' response to Clearstream's motion to vacate. This Court agrees.

i. Political Question

The Court rejected the political question argument with respect to Bank Markazi's motion to dismiss and Clearstream's version of the argument is not materially different.

Clearstream adds only one novel aspect to its political question argument: it argues that a turnover order will subject it to inconsistent obligations in the United States and Europe. If the plaintiffs were to obtain a turnover order, the resulting debit in the Luxembourg book entry might violate the E.U. blocking regime and Clearstream's obligation to Bank Markazi.

However, even if a change in the Clearstream accounts in the U.S. will cause a book entry in Luxembourg—placing Clearstream at risk of violating EU Regulations—that issue is one left to Clearstream to address in the EU. As stated above, if this Court were required to hypothesize as to the implications of foreign regulations with respect to actions before it, paralysis would result in numerous situations: U.S. courts would no doubt be inundated with such issues brought forward tactically. There is no such hardline rule, and in a world of transnational commerce there should not be.

ii. Remaining Arguments for Vacating the Restraints

The same statute—22 U.S.C. § 8772—crucial to resolving Bank Markazi's motion to dismiss also answers

the remaining arguments Clearstream has raised in support of its motion to vacate. Section 8772 specifically preempts "any other provision of law" including "any inconsistent provision of state law." 22 U.S.C. § 8772(a)(1). Accordingly, this Court need not address the potpourri of UCC-based arguments raised by Clearstream: Section 8772 provides that, so long as the appropriate judicial determinations are made, there is no legal barrier to execution on the Blocked Assets.

Accordingly, the Court denies Clearstream's motion to vacate the restraints.

V. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs have moved for partial summary judgment against defendants Clearstream, Bank Markazi, and UBAE[13] on their cause of action for turnover of the approximately $1.75 billion[14] in Blocked Assets, held in the

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[13] UBAE did not file substantive opposition to plaintiffs' partial summary judgment motion initially. It argued that it should not be compelled to respond to plaintiffs' motion until its own Rule 12(b)(2) motion to dismiss had been decided. In the interests of judicial economy, the Court issued an Order on February 14, 2013, directing UBAE to file any opposition to plaintiffs' motion, and directed UBAE to "assume that the Court finds sufficient bases to exercise personal jurisdiction over it." (See Order, Feb. 14, 2013, ECF No. 325.) UBAE filed its substantive opposition brief on February 22, 2013. (ECF No. 328.)

[14] UBAE correctly points out that the two securities with a face value of $250 million it is alleged to have conveyed fraudulently in early 2008 are not at issue in the plaintiffs' motion for partial summary judgment. (See UBAE S.J. Opp. Br. at 2 n.2.) The Court does not resolve any merits issues as regards claims based on this alleged conveyance.

Omnibus Account at Citibank.[15]

The Court has already determined that the assets at issue are properly restrained. The question before the Court is now whether there exist triable issues of fact as to whether those assets are subject to turnover.

While both Clearstream and Bank Markazi raise additional arguments (many of which were already raised in the prior motions), the crux of this motion is really a single question: is there a triable issue as to whether the Blocked Assets are owned by Bank Markazi? In the context of the motion to vacate the restraints, Clearstream had stipulated that UBAE had no beneficial interest and the transfer between UBAE and Bank Markazi was unwound. There is no such stipulation on this motion.

For the reasons set forth below, this Court finds that the record evidence is clear and one-sided: there is no triable issue on this question. No rational juror could find that any person or entity—other than Bank Markazi—has a constitutional, beneficial or equitable interest in the Blocked Assets; plaintiffs are therefore entitled to turnover as a matter of law.

Defendants also argue that turnover would run afoul of certain constitutional rights: first, that the specific statutory provision, 22 U.S.C. § 8772 is an invalid legislative act of adjudication that violates Article III; second, that it constitutes an unlawful bill of attainder, U.S. Const. art. I, § 9, cl. 3; third, that turnover would amount to an unconstitutional taking in violation of their due process rights. See U.S. Const. amend. V. None of these arguments has merit.

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[15] As set forth above, plaintiffs have reached agreement regarding priority, as between themselves, of distribution of the assets. Accordingly, the Court does not address any such questions herein.

A. Legal Standard for Summary Judgment

Summary Judgment, as to all or part of a claim, is warranted if the pleadings, the discovery and disclosure materials, along with any affidavits that are admissible, demonstrate that there is no genuine issue of fact necessitating resolution at trial. Fed. R. Civ. P. 56(c); see also *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322–323 (1986). A party moving for summary judgment bears the initial burden of demonstrating that no genuine issue of material fact exists; all reasonable inferences should be drawn in favor of the non-moving party. See *Anderson*, 477 U.S. at 255; *Grady* v. *Affiliated Cent., Inc.*, 130 F.3d 553, 559 (2d Cir. 1997). The burden then shifts to the non-moving party to come forward with "admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." See *Jaramillo* v. *Weyerhauser Co.*, 536 F.3d 140, 145 (2d Cir. 2008). Where the non-moving party would bear the ultimate burden of proof on an issue at trial, the moving party satisfies its burden on the motion by pointing to an absence of evidence to support an essential element of the non-movant's claim. See *Libraire* v. *Kaplan*, CV No. 06-1500, 2008 WL 794973 at *5 (E.D.N.Y. Mar. 24, 2008). Where it is clear that no rational trier of fact could find in favor of the non-moving party, summary judgment is warranted. *Gallo* v. *Prudential Residential Servs., Ltd.*, 22 F.3d 1219, 1223 (2d Cir. 1994). The mere possibility that a dispute may exist, without more, is not sufficient to overcome a convincing presentation by the moving party." *Anderson*, 477 U.S. at 247–48. Mere speculation or conjecture is insufficient to defeat a motion. *W. World Ins. Co.* v. *Stack Oil, Inc.*, 922 F.2d 118, 121 (2d Cir. 1990).

B. Analysis

As stated above, in opposition to this motion, defendants have filled the proverbial kitchen sink with arguments. As the Court has reviewed the thousands of pages of briefing on and in support of these motions, building in a crescendo to the instant motion, it cannot help but be reminded of the grand finale in a Fourth of July fireworks show—all arguments thrown in and set off at once. While this Court has carefully reviewed all of defendants' various arguments, it will not address each of them here.[16] It need not do so because the basic question and the dispositive legal principles do not require descent into those waters—or into that sink, to mix metaphors.

i. The Blocked Assets are Bank Markazi's

Clearstream argues that there are triable issues as to whether Bank Markazi is the "owner of" the Blocked Assets. As with similar arguments made in the context of the motion to dismiss, the arguments made in support of this assertion are based on laws preempted by 22 U.S.C. § 8772.

As noted above, § 8772 requires the Court to determine who—other than an agency or instrumentality of Iran—has a constitutional, beneficial or equitable interest in the assets at issue. None of the defendants cite authority or facts supporting that any entity other than Bank Markazi has such an interest.

On this record and as a matter of law no other entity could have an equitable or beneficial interest. A beneficial interest is "[a] right or expectancy in something as opposed to legal title to that thing." Interest, Black's

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[16] Defendants' UCC, situs of property and Treaty of Amity arguments, in particular, are mooted by the Court's determination with respect to 22 U.S.C. § 8772.

Law Dictionary (9th ed. 2009). The key factor is whether "the property benefitted [the beneficial owner] as if he had received the property directly. See *Exp.-Imp. Bank of U.S.* v. *Asia Pulp & Paper Co., Ltd.*, 609 F.3d 111, 120 (2d Cir. 2010) (citing *United States* v. *Coluccio*, 51 F.3d 337, 341 (2d Cir. 1995)). Clearstream's only role with regard to the Blocked Assets is as the agent of Bank Markazi. Even absent the restraints, it fails to proffer any evidence that it has the right to use or move the Blocked Assets held at Citibank without express permission or direction from Bank Markazi. Nor does Clearstream have equitable title, "a beneficial interest in property [that] gives the holder the right to acquire formal legal title." *Lippe* v. *Genlyte Group Inc.*, 98 CIV 8672(DC), 2002 WL 531010 (S.D.N.Y. Apr. 8, 2002) (citing Black's Law Dictionary 1493 (7th ed. 1999)). Clearstream does not allege—and puts forward no facts—that it has legal title or the right to acquire that title for the Blocked Assets. UBAE disclaims any "legally congnizable interest" in the Citibank proceeds.[17] They are both merely account holders without authority to move or use the assets in the absence of direction. They simply—like Citibank—maintain that account on behalf of another, Bank Markazi.

In addition, Bank Markazi's arguments that it is immune from pre- or post-judgment attachment depend upon preempted provisions of the FSIA. See 22 U.S.C. § 8772(a).

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[17] UBAE admits that it has "no legally cognizable interest" in the restrained bonds. (UBAE SJ Opp. Br. at 2–3.) UBAE thus admits that which plaintiffs wish to prove on summary judgment: there is no issue of material fact as to the ownership of the Markazi Bonds with respect to UBAE (and, as the remainder of the above analysis shows, nor does Clearstream have any such ownership interest).

Bank Markazi has repeatedly insisted that it is the sole beneficial owner of the Blocked Assets. As set forth above, but bears repeating in the context of the Court's analysis of this motion, in various submissions Bank Markazi has asserted that "Over $1.75 billion in securities belonging to Bank Markazi . . are frozen in a custodial Omnibus Account at [Citibank]"; that the "Restrained Securities are the property of Bank Markazi, the Central Bank of Iran", that the "aggregate value of the remaining bond instruments, *i.e.* the Restrained Securities that are the property of Bank Markazi and the subject of the Turnover Action—is thus $1,753 billion"; that the "Restrained Securities are the property of a Foreign Central Bank "; that the "Restrained Securities are presumed to be the property of Bank Markazi"; and "the Restrained Securities are prima facie the property of a third party, Bank Markazi " (See Bank Markazi's First Mem. of L. in Support of its Mot. to Dismiss the Am. Compl., May 11, 2011, ECF No. 18 ("Markazi's First MOL"), at 1, 5, 9, 10, 36 (emphases added).) In addition, two officers of Bank Markazi have sworn under penalty of perjury that the Blocked Assets are the "sole property of Bank Markazi and held for its own account." (Aff. of Gholamossein Arabieh ¶ 2, Vogel Decl. Ex. J, Oct. 17, 2010, ECF No. 210; Aff. of Ali Asghar Massoumi ¶ 2, Vogel Decl. Ex. K, Oct. 17, 2010, ECF No. 210.)

There simply is no other possible owner of the interests here other than Bank Markazi; there is no triable issue of fact.

ii. Constitutional Arguments

Bank Markazi and Clearstream urge that, if this Court determines that the assets are subject to turnover pursuant to § 8772, prior to doing so it must consider whether that statute passes constitutional muster. In this regard,

their arguments combine both general constitutional arguments with specific arguments directed at 22 U.S.C. § 8772. As set forth above, § 8772(a)(5) provides that this Court must make a judicial determination as to whether another person has a constitutionally protected interest in the assets. The Court has made such a determination, and no other person has such an interest.

Clearstream and Bank Markazi's various constitutional arguments are without merit.[18]

a. Separation of Powers

First, defendants Clearstream and Bank Markazi argue that, pursuant to Article III of the Constitution, 22 U.S.C. § 8772 is a congressional act violative of the separation of powers. (See Bank Markazi Supp. Mem. of L. in Opp. to Pls.' Mot. for Partial Summ. J. ("Markazi Supp. SJ Br.") at 10–12.) They argue that, in passing § 8772, Congress effectively dictated specific factual findings in connection with a specific litigation—invading the province of the courts. (*Id.*) See *U.S.* v. *Klein*, 80 U.S. 128, 146 (1871) (Congress may not prescribe rules of decision). According to Bank Markazi, the statute's requirement of judicial determinations does not save it since those determinations are "legislative fig lea[ves]" that pre-determine a finding that turnover is required. (Markazi Supp. SJ Br. at 12.)

This argument ignores the structure of the statute. The statute does not itself "find" turnover required; such

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[18] Plaintiffs have asserted that Clearstream does not itself have standing to raise constitutional challenges because it does not own or even have a beneficial interest in the Blocked Assets. Because none of the constitutional challenges has merit—whether raised by Bank Markazi or Clearstream (and they are raised by both of those defendants)—the Court need not and does not reach the standing issue.

determination is specifically left to the Court. The statute is not a self-executing congressional resolution of a legal dispute, but rather requires the Court to make determinations regarding (1) whether and to what extent Iran has a beneficial or equitable interest in the assets at issue, and (2) whether constitutionally-protected interest holders other than Iran are present. These determinations are not mere fig leaves; it is quite possible that the Court could have found that defendants raised a triable issue as to whether the Blocked Assets were owned by Iran, or that Clearstream and/or UBAE have some form of beneficial or equitable interest. Any such finding of true third party interest could limit—or even eliminate—turnover (at least at this time). The statute merely "chang[es] the law applicable to pending cases;" it does not "usurp the adjudicative function assigned to the federal courts[.]" See *Axel Johnson, Inc.* v. *Arthur Andersen & Co.*, 6 F.3d 78, 81 (2d Cir. 1993). There is frankly plenty for this Court to adjudicate.

b. Bills of Attainder and Ex Post Facto Law

Similarly, § 8772 does not violate the constitutional prohibition against bills of attainder or ex post facto laws. Bills of attainder exist when a congressional act (1) legislatively determines guilt, and (2) inflicts punishment upon an identifiable individual, (3) without the protections accompanying a trial. See *Nixon* v. *Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977). A critical aspect of a bill of attainder is its retrospective nature—classically, defining conduct which has already occurred (and was legal when it occurred) as illegal. *Consol. Edison Co.* v. *Pataki*, 292 F.3d 338, 349 (2d Cir. 2002). In short, it is an ex post facto declaration or finding of guilt by legislative act.

Here, there is no retrospective "punishment" enacted against any defendant. As the Court found above, the

financial intermediaries—UBAE and Clearstream—have no constitutional, beneficial, or equitable interest in the assets at issue; thus, it is impossible for seizure of those assets to constitute "punishment" as to them. As to Bank Markazi, now many years ago plaintiffs obtained default judgments as to liability and damages against the Iranian Government. Iran's conduct leading to such determinations was based on established common law principles. Iran's liability and its required payment of damages was therefore established years prior to the 2012 Act. At issue now is merely execution on assets present in this district, in connection with those judgments. Prior to the 2012 Act, the FSIA and TRIA, along with the CPLR, supported restraint and execution against those assets. Section 8772 is thus a legislative act that does not determine "guilt" The law is clear that forbidden legislative punishment is not involved "merely because [the act] imposes burdensome consequences." *Nixon*, 433 U.S. at 742.

Section 8772 is therefore also not backward-looking; it did not change the reasonable expectations of parties as to which assets may be subject to attachment and turnover. Indeed, this litigation regarding attachment of the assets at issue was commenced long before the passage of § 8772.

c. Takings

Nor does the statute effect an unconstitutional taking without just compensation as to either Clearstream or Bank Markazi. The Takings Clause of the Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amdt. V

Clearstream has no constitutionally protected property interest in the Blocked Assets. It makes a purely legal

argument that such an interest arises from its alleged right to payment from Citibank. This argument is without merit. Clearstream is in no different position from Citibank: it is merely a stakeholder without any cognizable interest in the resolution of this dispute on the merits. No doubt it views it necessary for client relations to advocate forcefully against negative impacts to its client's (Bank Markazi) interests, but the fact remains that there is no record evidence that it is acting as anything other than an agent; it does not own the assets at issue.

The cases which Clearstream cites in support of its position do not alter this analysis. For instance, *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992), refers to a taking as extinguishing a property right. *Lucas* related to real property. Of course, Clearstream's interest in the Blocked Assets is one of account entry only—it provides services with respect to assets for its clients, UBAE, on behalf Bank Markazi. Nothing in the record supports that Clearstream could unilaterally choose to use those assets.

The regulatory takings doctrine set forth in *Penn Central Transp. Co.* v. *N.Y.*, 438 U.S. 104, 124 (1978), also cited by Clearstream, is similarly inapposite. There, the Supreme Court found that a regulation—structured in a particular manner—could result in a taking. When faced with such issues, courts are to ask about (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations . and (3) the character of the government action. Clearstream's only argument in support of such a regulatory taking is that as a stakeholder, if the assets are turned over, it might be exposed to claims from Bank Markazi. That is no different from Citibank's position. Clearstream does not have distinct

investment-backed expectations—indeed, it cannot use these funds itself. The regulatory structure surrounding turnover provides for ample (and there certainly has been ample) due process in furtherance of an important and reasonable governmental interest in pursuing its national security goals.

Finally, of course, Clearstream's rights and obligations are frankly no different under § 8772 than in the absence of that statute. The statute perhaps allows a court, if it were at the beginning of this process, to weed out baseless arguments. However, the outcome of this matter is neither entirely nor primarily dependent on the existence of § 8772. The combination of the FSIA, TRIA, and E.O. 13599 would lead to the same result. Accordingly, § 8772 cannot be an independent "taking" of that to which Clearstream and UBAE are not entitled and Bank Markazi is no longer entitled.

For that reason Bank Markazi's suggestion that the statute effects a taking *per se*—completely appropriating Markazi's property and depriving it of all economically beneficial use—is incorrect. See *Lucas*, 505 U.S. at 1019. Markazi has no reasonable expectation in the assets at issue because, as the court held in *Hausler II*, once assets are blocked, "parties with interests in those assets have no reasonable expectation that their interests will not be diminished or extinguished."

Nor does § 8772 effect a taking for purely private use. Bank Markazi points out that the U.S. government "may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation." *Kelo* v. *City of New London, Conn.*, 545 U.S. 469, 477 (2005). The sole purpose of § 8772, Markazi argues, is to expropriate sovereign prop-

erty for a purely private purpose. (See Markazi Supp. SJ Br. at 19.)

But the statute does not lack a public purpose. As the Court held in connection with another action seeking turnover of Iranian assets, awarding such assets does not violate the public use requirement where, as here, the Government seeks to address the " 'unusual and extraordinary threat to the national security, foreign policy, and economy of the United States' that . . . Iran poses to the United States." See *In re 650 Fifth Ave. and Related Props.*, 777 F. Supp. 2d 529, 576–77 (S.D.N.Y. 2011) (quoting Exec. Order No. 12957, 60 FR 14615 (March 15, 1995)).

Moreover, even § 8772 requires that this Court make certain judicial determinations prior to ordering turnover: that no party has a constitutional, beneficial or equitable interest in the property at issue. In connection with making these determinations, the Court has allowed many submissions; the many felled trees required for this Court to plow through are evidence of that process.

Finally, Clearstream's argument that turnover would violate Equal Protection also fails. The law is clear that legislation is presumed valid and will be upheld so long as it is reasonably related to a legitimate state interest. See *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). There can be no serious dispute that § 8772 furthers the United States' legitimate interest in furthering its foreign policy with respect to Iran. Clearstream's argument that § 8772 unjustly discriminates against foreign intermediaries fails. The legislation is presumed valid—foreign intermediaries are entitled to no special treatment.

iii. UBAE's Arguments

UBAE is in no different a position—it is another layer of stakeholder trying to shield Bank Markazi from turnover. Nowhere does UBAE assert—nor could it—that it is the true beneficial owner of the Blocked Assets. Indeed, it disclaims any legally cognizable interest. At most, it is a layer in the sandwich built to try and interfere with execution on those assets. Even if UBAE can control the Blocked Assets, that control is irrelevant; it simply fits within E.O. 13599's provision for a person acting "directly or indirectly" on behalf of Iran.

Nor has the notice given UBAE been deficient; it has been served with all motion papers and its counsel have attended the conferences in this action. UBAE makes no additional arguments here that could credibly change the outcome of this motion with respect to it, nor to the other defendants. As a mere agent of Bank Markazi, then, the Blocked Assets held in the name of UBAE are subject to turnover.

iv. Defendants' other arguments against turnover

Defendants' final array of arguments in opposition to this motion were already dispensed with on the basis of § 8772.

Defendants argue that (1) if this Court found that the assets are Bank Markazi's, allowing execution thereon would violate the Treaty of Amity; (2) if the assets are those "of" Bank Markazi, then plaintiffs have failed to demonstrate that there is no triable issue as to whether, under the FSIA § 1611(b)(1), they are assets used for central bank purposes; (3) that Bank Markazi is immune from pre-judgment and post-judgment attachment and that immunity cannot be waived, and (4) a variety of ar-

guments regarding whether the assets are theoretically located in Luxembourg and not New York.

None of these arguments succeed. The Court specifically refers to earlier discussions relating to the arguments above. Section 8772 explicitly states the congressional intent that Iran be held accountable for the judgments against it. Importantly, the statute explicitly refers to those assets at issue in this action. Accordingly, Congress has itself swept aside defendants' final arguments.

On a motion for summary judgment, the Court must determine whether there is a triable issue of fact precluding turnover. As discussed above, there is not. Bank Markazi—the central bank of Iran—has repeatedly asserted it is the sole beneficial owner of the assets. No other party can raise a triable issue as to that, the ultimate question. And on the evidence in this record, no rational juror could find otherwise.

Plaintiffs' motion for partial summary judgment is granted.

VI. BLAND MOTION FOR EXECUTION

As a final matter, the Bland judgment creditors present a motion for execution under 28 U.S.C. § 1610.[19] The Bland group already possesses a § 1610 order, issued October 4, 2012, by the U.S. District Court for the District of Columbia. See Order, *Estate of Steven Bland, et al.* v. *Islamic Republic of Iran, et al.*, 05-cv-2124 (RCL) (D.D.C. Oct. 4, 2012), ECF No. 84. They seek an additional order within this District.

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[19] The Bland creditors are the plaintiffs in *Estate of Steven Bland, et al.* v. *Islamic Republic of Iran, et al.*, 05-cv-2124 (RCL) (D.D.C.).

While the Court expresses no opinion as to the necessity of a § 1610(c) order in a TRIA action,[20] the Bland creditors make a sufficient showing for an order of execution under § 1610(c). That section of FSIA provides for execution of a valid judgment against an instrumentality of a terrorist state where (1) the Court "determine[s] that a reasonable period of time has elapsed following the entry of judgment", and (2) proper "notice required under section 1608(e)" has been given. 28 U.S.C. § 1610(c). Under § 1608(e), a defaulting foreign sovereign must be served in accordance with one of several methods, including "by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state to the Secretary of State" for transmittal via diplomatic note. 28 U.S.C. §§ 1608(a), (e).

The Bland judgment meets both of the § 1610(c) requirements. Claimants present a valid default judgment against Iran dated December 12, 2011. (Bland Mot. for Entry of Order Pursuant to 28 U.S.C. § 1610(c) ("Bland § 1610(c) Mot."), Ex. A, ECF No. 305.) Service on Iran via the Department of State was completed on July 4, 2012, in accordance with 28 U.S.C. § 1608(a). See Aff. of Service, *Estate of Steven Bland, et al.* v. *Islamic Republic of Iran, et al.*, 05-cv-2124 (RCL) (D.D.C. Aug. 13, 2012), ECF No. 82. The Government of Iran has had more than 100 days as of the date of this Opinion and Order in which to respond to the Bland judgment; it has not. This period is reasonable for the purposes of

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[20] The Peterson plaintiffs have argued in separate briefing that no § 1610(c) order is required to execute under TRIA. (See Pls.' Summ. J. Reply at 54–57.) As the Court finds that the requirements of § 1610(c) are met with respect to the Bland creditors, it need not address the order's relevance to TRIA.

§ 1610(c). See, *e.g.*, *Gadsby & Hannah* v. *Socialist Republic of Romania*, 698 F Supp. 483, 486 (S.D.N.Y. 1988) (two months constitutes a "reasonable period of time" under § 1610(c)); *Ferrostaal Metals* v. *S.S. Lash Pacifico*, 652 F. Supp. 420, 423 (S.D.N.Y. 1987) (three months constitutes reasonable time under § 1610(c)).

The Bland creditors' motion for an order of attachment and/or turnover pursuant to 28 U.S.C. § 1610 is granted. They may proceed to collection of the Bland Judgment by attachment and/or execution, or by any other means permitted by applicable law against the assets of the Islamic Republic of Iran and the Iranian Ministry of Information and Security, in accordance with 28 U.S.C. §§ 1610(a), (b).

CONCLUSION

For these reasons and set forth more fully above, the following motions are DENIED:

- UBAE's Motion to Dismiss;
- Clearstream's Motion to Dismiss;
- Bank Markazi's Motion to Dismiss;
- Clearstream's Motion to Vacate the Restraints and Renewed Motion to Vacate the Restraints;

For the reasons set forth above, the following motions are GRANTED:

- Plaintiffs' Motion for Partial Summary Judgment;
- The Bland judgment creditors' motion for execution;

The parties shall confer and jointly and, not later than March 15, 2013, submit a proposed schedule to resolve the remainder of the case. If the parties are unable to agree, they shall set forth in a letter by the same date the

matters and issues which they believe remain to be resolved and each party's proposed schedule.

The Clerk of Court is directed to close the motions at ECF Nos. 174, 205, 209, 295, 299 (under seal), 301, and 305 (under seal).

SO ORDERED.

Dated: New York, New York
February 28, 2013

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CASE NO. 18 MISC. 8302

DEBORAH D. PETERSON, Personal Representative of the Estate of James C. Knipple (Dec.), et al.,
Plaintiffs,

v.

ISLAMIC REPUBLIC OF IRAN, et al.,
Defendants.

ORDER

JUNE 23, 2009

BARBARA S. JONES, United States District Judge.

The Court issues this order in anticipation of a July 1st, 2009 conference on the issue of Plaintiff's application for leave to serve a second restraining notice or for an order extending the restraining notices previously served upon Citibank and Clearstream.

At that conference, the Court intends to discuss, in addition to Plaintiffs' application, the other motions pending in this case. The Court has come to certain conclusions concerning some but not all of the issues raised in these motions. In the hopes of moving toward a final determination, the Court advises the parties of the following holdings:

The Court agrees with Clearstream that the assets that are the subject of Clearstream's September 4, 2008 motion to vacate restraints are governed by NY UCC 8-122(c). Under the plain meaning of NY UCC 8-112(c), Clearstream is not a proper garnishee. NY UCC 8-112(c) states: "The interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon the securities intermediary with whom the debtor's securities account is maintained." Clearstream does not currently carry on its books, in relation to the restraints in question, an account in the name of the Islamic Republic of Iran or one of its state agencies.

However, prior to a series of transfers in [redacted] between certain Clearstream accounts (discussed in parties' moving papers), Clearstream may have been a proper garnishee under NY UCC 8-112(c), if at that time the securities account of an Iran state entity was maintained with Clearstream.

Plaintiffs argue that Clearstream is still a proper garnishee, because the [redacted] activity related to those accounts was fraudulent and should be set aside (returning the relevant parties to their pre-[redacted] positions).

The restraints will remain in place until the Court has determined whether Clearstream is, or could be made, a proper garnishee, assuming a fraudulent conveyance could be shown by Plaintiffs. Although Plaintiffs and Clearstream submitted briefs discussing the law of fraudulent conveyance, the Court is not able at this time to determine whether or how that law could be applied in this situation. At the July 1st, 2009 conference, the Court intends to discuss with the parties the issues that must be resolved in order for that determination to be made.

Specifically, the Court will make inquiry of the parties on the following issues: 1) Plaintiffs' progress in discovery efforts; 2) whether security entitlements may be "transferred" in a manner susceptible to a fraudulent conveyance analysis; 3) what, if any, badges of fraud surrounded the [redacted] "transfers" challenged by Plaintiffs; 4) what remedies would be proper and viable in the event that a fraudulent conveyance were shown; 5) whether this Court has jurisdiction over the various parties holding an interest in the restrained assets; 6) the applicability of the FSIA; and 7) Plaintiffs' submission of revised subpoena requests in light of this order and those to be made at the July 1st hearing.

SO ORDERED:

Barbara S. Jones
United States District Judge

Dated: New York, New York
June 23, 2009

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DOCKET NO. 13-CV-2952

DEBORAH D. PETERSON, *ET AL.*,
Plaintiffs-Appellees,

v.

ISLAMIC REPUBLIC OF IRAN, *ET AL.*,
Defendants-Appellants.

ORDER

SEPTEMBER 29, 2014

Appellant Bank of Markazi, the Central Bank of Iran, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DOCKET NO. 13-CV-2952

DEBORAH D. PETERSON, *ET AL.*,
Plaintiffs-Appellees,

v.

ISLAMIC REPUBLIC OF IRAN, *ET AL.*,
Defendants-Appellants.

ORDER

OCTOBER 29, 2014

Before: Ralph K. Winter
John M. Walker, Jr.
Jose A. Cabranes,
Circuit Judges.

Appellant Bank of Markazi, the Central Bank of Iran, moves to stay the mandate pending the filing of a petition for a writ of certiorari.

IT IS HEREBY ORDERED that the motion is GRANTED.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

APPENDIX H

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Bank Markazi, the Central Bank of Iran, was a defendant in the district court and an appellant in the court of appeals.

The following respondents were plaintiffs in the district court and appellees in the court of appeals: Claudine Dunningan, ABC, Deborah D. Peterson, Personal Representative of the Estate of James C. Knipple, Terry Abbott, John Robert Allman, Ronny Kent Bates, James Baynard, Jess W. Beamon, Alvin Burton Belmer, Richard D. Blankenship, John W Blocker, Joseph John Boccia, Jr., Leon Bohannon, John Bonk, Jr., Jeffrey Joseph Boulos, John Norman Boyett, William Burley, Paul Callahan, Mecot Camara, Bradley Campus, Johnnie Cesar, Robert Allen Conley, Charles Dennis Cook, Johnny Len Copeland, David Cosner, Kevin Coulman, Rick Crudale, Russell Cyzick, Michael Devlin, Nathaniel Dorsey, Timothy Dunnigan, Brian Earle, Danny R. Estes, Richard Andrew Fluegel, Michael D. Fulcher, Sean Gallagher, George Gangur, Randall Garcia, Harold Ghumm, Michael Gorchinski, Richard Gordon, Davin M. Green, Thomas Hairston, Mark Anthony Helms, Stanley G. Hester, Donald Wayne Hildreth, Richard Holberton, John Hudson, Maurice Edward Hukill, Edward Iacovino, Jr., Paul Innocenzi, III, James Jackowski, Jeffrey Wilbur James, Nathaniel Walter Jenkins, Edward Anthony Johnston, Steven Jones, Thomas Adrian Julian, Thomas Keown, Daniel Kluck, James C. Knipple, Freas H. Kreischer, III, Keith Laise, James Langon, Michael Scott LaRiviere, Steven LaRiviere, Richard Lemnah, Joseph R. Livingston, III, Paul Lyon, Jr., John Macroglou, Samuel Maitland, Jr., Charlie Robert Martin, David Massa, John

McCall, James E. McDonough, Timothy R. McMahon, Richard Menkins, III, Ronald Meurer, Joseph Peter Milano, Joseph Moore, Harry Douglas Myers, David Nairn, John Arne Olson, Joseph Albert Owens, Connie Ray Page, Ulysses Gregory Parker, John L. Pearson, Thomas S. Perron, John Arthur Phillips, Jr., William Roy Pollard, Victor Mark Prevatt, James Price, Patrick Kerry Prindeville, Diomedes J. Quirante, Warren Richardson, Louis J. Rotondo, Michael Caleb Sauls, Charles Jeffrey Schnorf, Scott Lee Schultz, Peter Scialabba, Gary Randall Scott, Jerryl Shropshire, Larry H. Simpson, Jr., Kirk Hall Smith, William Scott Sommerhof, Stephen Eugene Spencer, William Stelpflug, Horace Renardo Stephens, Jr., Craig Stockton, Jeffrey Stokes, Eric D. Sturghill, Devon Sundar, Thomas Paul Thorstad, Stephen Tingley, Donald H. Vallone, Jr., Eric Glenn Washington, Dwayne Wigglesworth, Rodney J. Williams, Scipio Williams, Jr., Johnny Adam Williamson, William Ellis Winter, Donald Elberan Woollett, Craig Wyche, Jeffrey D. Young, Marvin Albright, Pablo Arroyo, Anthony Banks, Rodney Darrell Burnette, Frank Comes, Glenn Dolphin, Frederick Daniel Eaves, Lilla Woollett Abbey, James Abbott, Elizabeth Adams, Eileen Prindeville Ahlquist, Miralda Alarcon, Anne Allman, DiAnne Margaret Allman, Robert Allman, Margaret E. Alvarez, Kimberly F Angus, Donnie Bates, Johnny Bates, Laura Bates, Margie Bates, Monty Bates, Thomas Bates, Jr., Estate of Mary Abbott, Estate of Theodore Allman, Charles Frye, Truman Dale Garner, Larry Gerlach, John Hlywiak, Orval Hunt, Joseph P. Jacobs, Brian Kirkpatrick, Burnham Matthews, Timothy Mitchell, Jeffrey Nashton, John Oliver, Paul Rivers, Stephen Russell, Dana Spaulding, Craig Joseph Swinson, Michael Toma, Danny Wheeler, Thomas D. Young, Thomas C. Bates, Sr., Mary E. Baumgartner, Anthony Baynard, Barry

Baynard, Emerson Baynard, Philip Baynard, Thomasine Baynard, Timothy Baynard, Stephen Baynard, Wayne Baynard, Anna Beard, Mary Ann Beck, Alue Belmer, Annette Belmer, Clarence Belmer, Colby Keith Belmer, Denise Belmer, Donna Belmer, Faye Belmer, Kenneth Belmer, Luddie Belmer, Shawn Biellow, Mary Frances Black, Donald Blankenship, Jr., Donald Blankenship, Sr., Alice Blocker, Douglas Blocker, John R. Blocker, Robert Blocker, James Boccia, Joseph Boccia, Sr., Patricia Boccia, Raymond Boccia, Richard Boccia, Ronnie Boccia, Leticia Boddie, Angela Bohannon, Anthony Bohannon, Carrie Bohannon, David Bohannon, Edna Bohannon, Leon Bohannon, Sr., Ricki Bohannon, Billie Jean Bolinger, Joseph Boulos, Lydia Boulos, Estate of Mary Blackenship, Marie Boulos, Rebecca Bowler, Lavon Boyett, Theresa U. Roth Boyett, William A. Boyett, Estate of Norman E. Boyett, Jr., Damion Briscoe, Christine Brown, Rosanne Brunette, Rosanne Buckner, Mary Lynn Buckner, Myra Burley, Kathleen Calabro, Rachel Caldera, Estate of Claude Burley, Estate of William Douglas Burley, Susan Schnorf Breeden, Avenell Callahan, Michael Callahan, Patricia Calloway, Elisa Rock Camara, Theresa Riggs Camara, Candace Campbell, Clare Campus, Elaine Capobianco, Florene Martin Carter, Phyllis A. Cash, Theresa Catano, Bruce Ceasar, Franklin Ceasar, Frederick Ceasar, Robbie Neil Ceasar, Sybil Ceasar, Christine Devlin Cecca, Tammy Chapman, James Cherry, Sonia Cherry, Adele H. Chios. Jana M. Christian, Sharon Rose Christian, Susan Ciupaska, Leshune Stokes Clark, Rosemary Clark, Mary Ann Cobble, Karen Shipp Collard, Jennifer Collier, Melia Winter Collier, Deborah M. Coltrane, James N. Conley, Jr., Roberta Li Conley, Charles F Cook, Elizabeth A. Cook, Alan Tracy Copeland, Betty Copeland, Blanche Corry, Harold Cosner, Jeffrey Cosner, Leanna Cosner, Cheryl Cossaboom,

Bryan Thomas Coulman, Christopher J. Coulman, Dennis P. Coulman, Lorraine M. Coulman, Robert D. Coulman, Charlita Martin Covington, Amanda Crouch, Marie Crudale, Eugene Cyzick, Lynn Dallachie, Anne Deal, Lynn Smith Derbyshire, Theresa Desjardins, Christine Devlin, Daniel Devlin, Gabrielle Devlin, Richard Devlin, Sean Devlin, Rosalie Milano Donahue, Ashley Doray, Rebecca Doss, Chester Dunnigan, Elizabeth Ann Dunningan, Michael Dunningan, William Dunningan, Janice Thorstad Edquist, Mary Ruth Ervin, Estate of Marva Lynn Cosner, Estate of Mary A. Cook, Barbara Estes, Charles Estes, Frank Estes, Angela Dawn Farthing, Arlington Ferguson, Lori Fransler, Estate of James Gallagher, Estate of Jediah Ghumm, Hilton Ferguson, Linda Sandback Fish, Nancy Brocksbank Fox, Tia Fox, Tammy Freshour, Ruby Fulcher, Barbara Gallagher, Brian Gallagher, James Gallagher, Jr., Kevin Gallagher, Michael Gallagher, Dimitri Gangur, Mary Gangur, Jess Garcia, Ronald Garcia, Roxanne Garcia, Russell Garcia, Violet Garcia, Suzanne Perron Garza, Jeanne Gattegno, Arlene Ghumm, Ashley Ghumm, Bill Ghumm, Edward Ghumm, Hildegard Ghumm, Jesse Ghumm, Leroy Ghumm, Moronica Ghumm, Donald Giblin, Jeanne Giblin, Michael Giblin, Tiffany Giblin, Valerie Giblin, William Giblin, Thad Gilford-Smith, Rebecca Gintonio, Dawn Goff, Christina Gorchinski, Judy Gorchinski, Kevin Gorchinski, Valerie Gorchinski, Alice Gordon, Joseph Gordon, Estate of Norris Gordon, Estate of Samuel Hudson, Linda Gordon, Paul Gordon, Andrea Grant, Deborah Graves, Deborah Green, Liberty Quirante Gregg, Alex Griffin, Catherine E. Grimsley, Megan Grummer, Lyda Woollett Guz, Darlene Hairston, Tara Hanrahan, Mary Clyde Hart, Jeffrey Haskell, Brenda Haskill, Kathleen S. Hedge, Christopher Todd Helms, Marvin R. Helms, Doris Hester, Clifton Hildreth, Julia Hildreth, Mary Ann Hildreth,

Michael Wayne Hildreth, Sharon A. Hilton, Donald Holberton, Patricia Lee Holberton, Thomas Holberton, Tangie Hollifield, Debra Horner, Elizabeth House, Joyce A. Houston, Tammy Camara Howell, Lisa H. Hudson, Lorenzo Hudson, Lucy Hudson, Ruth Hudson, William J. Hudson, Estate of Edward Iacovino Sr., Estate of Susan Thorstad Hudson, Nancy Tingley Hurlburt, Cynthia Perron Hurston, Estate of John D. Knipple, Estate of Pauline Knipple, Estate of Synovure Jones, Elizabeth Iacovino, Deborah Innocenzi, Kristin Innocenzi, Mark Paul Innocenzi, IV, Bernadette Jaccom, John Jackowski, Sr., John Jackowski, Jr., Victoria Jacobus, Elaine James, Nathalie C. Jenkins, Stephen Jenkins, Linda Martin Johnson, Ray Johnson, Rennitta Stokes Johnson, Sherry Johnson, Charles Johnston, Edwin Johnston, Mary Ann Johnston, Zandra LaRiviere Johnston, Alicia Jones, Corene Martin Jones, Kia Briscoe Jones, Mark Jones, Ollie Jones, Sandra D. Jones, Robin Copeland Jordan, Susan Scott Jordan, Joyce Julian, Karl Julian, Nada Jurist, Adam Keown, Bobby Keown, Sr., Darren Keown, William Keown, Mary Joe Kirker, Kelly Kluck, Michael Kluck, John R. Knipple, Shirley L. Knox, Doreen Kreischer, Freas H. Kreischer, Jr., Cynthia D. Lake, Estate of Clarence Lemnah, Estate of Richard G. LaRiviere, Eugene LaRiviere, Janet LaRiviere, John M. LaRiviere, Lesley LaRiviere, Michael LaRiviere, Nancy LaRiviere, Richard LaRiviere, Robert LaRiviere, William LaRiviere, Wendy L. Lange, James Langon, III, Cathy L. Lawton, Heidi Crudale LeGault, Etta Lemnah, Fay Lemnah, Harold Lemnah, Marlys Lemnah, Robert Lemnah, Ronald Lemnah, Annette R. Livingston, Estate of Joseph R. Livingston, Joseph R. Livingston, IV, Robin M. Lynch, Earl Lyon, Francisco Lyon, June Lyon, Maria Lyon, Paul D. Lyon, Sr., Valerie Lyon, Heather Macroglou, Kathleen Devlin Mahoney, Kenty Maitland,

Leysnal Maitland, Samuel Maitland, Sr., Shirla Maitland, Virginia Boccia Marshall, John Martin, Pacita Martin, Renerio Martin, Ruby Martin, Shirley Martin, Mary Mason, Cristina Massa, Estate of Campbell J. Nairn, Estate of Michael Moore, Estate of Thomas McCall, Edmund Massa, Joao Massa, Jose Massa, Manuel Massa, Jr., Ramiro Massa, Mary McCall, Valerie McCall, Gail McDermott, Julia A. McFarlin, George McMahon, Michael McMahon, Patty McPhee, Darren Menkins, Gregory Menkins, Margaret Menkins, Richard H. Menkins, Jay T. Meurer, John Meurer, Michael Meurer, John Thomas Meurer, Mary Lou Meurer, Penny Meyer, Angela Milano, Peter Milano, Jr., Earline Miller, Henry Miller, Patricia Miller, Helen Montgomery, Betty Moore, Harry Moore, Kimberly Moore, Mary Moore, Melissa Lea Moore, Elizabeth Phillips Moy, Debra Myers, Geneva Myers, Harry A. Myers, Billie Ann Nairn, Campbell J. Nairn, Jr., William P Nairn, Richard Norfleet, Deborah O'Connor, Estate of Barbara D. Prindeville, Estate of Bertha Olson, Estate of James Owens, Estate of Sigurd Olson, Pearl Olaniji, Karen L. Olson, Randal D. Olson, Roger S. Olson, Ronald J. Olson, David Owens, Deanna Owens, Frances Owens, Steven Owens, Connie Mack Page, Judith K. Page, Lisa Menkins Palmer, Geraldine Paolozzi, Maureen Pare, Henry James Parker, Sharon Parker, Helen M. Pearson, John L. Pearson, Sr., Sonia Pearson, Brett Perron, Deborah Jean Perron, Michelle Perron, Ronald R. Perron, Muriel Persky, Sandra Petrick, Sharon Conley Petry, Donna Vallone Phelps, Harold Phillips, John Arthur Phillips, Sr., Donna Tingley Plickys, Margaret Aileen Pollard, Stacey Yvonne Pollard, Lee Hollan Prevatt, Victor Thornton Prevatt, John Price, Joseph Price, Kathleen Tara Prindeville, Michael Prindeville, Paul Prindeville, Sean Prindeville, Estate of Godofredo Quirante, Estate of Larry L. Scott, Belinda J.

Quirante, Edgar Quirante, Milton Quirante, Sabrina Quirante, Susan Ray, Laura M. Reininger, Alan Richardson, Clarence Richardson, Eric Richardson, Lynette Richardson, Vanessa Richardson, Philiece Richardson-Mills, Melrose Ricks, Belina Quirante Riva, Barbara Rockwell, Linda Rose Rooney, Tammi Ruark, Juliana Rudkowski, Marie McMahon Russell, Alicia Lynn Sanchez, Andrew Sauls, Henry Caleb Sauls, Riley A. Sauls, Margaret Medler Schnorf, Richard Schnorf, brother, Richard Schnorf, father, Robert Schnorf, Beverly Schultz, Dennis James Schultz, Dennis Ray Schultz, Frank Scialabba, Jacqueline Scialabba, Samuel Scott Scialabba, Jon Christopher Scott, Kevin James Scott, Mary Ann Scott, Sheria Scott, Stephen Allen Scott, Jacklyn Seguerra, Bryan Richard Shipp, James David Shipp, Tara Smith, Estate of Angela Josephine Smith, Janice Shipp, Maurice Shipp, Pauline Shipp, Raymond Dennis Shipp, Russell Shipp, Susan J. Sinsioco, Bobbie Ann Smith, Cynthia Smith, Donna Marie Smith, Erma Smith, Holly Smith, Ian Smith, Janet Smith, Joseph K. Smith, Jr., Kelly B. Smith, Shirley L. Smith, Tadgh Smith, Terrence Smith, Timothy B. Smith, Ann Smith-Ward, Jocelyn J. Sommerhof, John Sommerhof, William J. Sommerhof, Douglas Spencer, Christy Williford Stelpflug, Joseph Stelpflug, Estate of Donald Stockton, Estate of Nelson Stokes Senior, Kathy Nathan Stelpflug, Laura Barfield Stelpflug, Peggy Stelpflug, William Stelpflug, Horace Stephens, Sr., Joyce Stephens, Keith Stephens, Dona Stockton, Richard Stockton, Irene Stokes, Nelson Stokes, Jr., Richard Stokes, Robert Stokes, Gwenn Stokes-Graham, Sturghill D. Sturghill, Marcus L. Sturghill, Jr., NaKeisha Lynn Sturghill, Doreen Sundar, Margaret Tella, Susan L. Terlson, Mary Ellen Thompson, Adam Thorstad, James Thorstad, James Thorstad, Jr., James Thorstad, Sr., Ryan Thorstad, Betty Ann

Thurman, Barbara Tingley, Richard L. Tingley, Russell Tingley, Keysha Tolliver, Mary Ann Turek, Karen Valenti, Anthony Vallone, Donald H. Vallone, Timothy Vallone, Leona Mae Vargas, Denise Voyles, Ila Wallace, Kathyrn Thorstad Wallace, Richard J. Wallace, Barbara Thorstad Warwick, Linda Washington, Vancine Washington, Kenneth Watson, Diane Whitner, Darrin A. Wigglesworth, Daryl Wigglesworth, Henry Wigglesworth, Mark Wigglesworth, Robyn Wigglesworth, Sandra Wigglesworth, Shawn Wigglesworth, Dianne Stokes Williams, Gussie Martin Williams, Janet Williams, Rhonda Williams, Ronald Williams, Johnny Williamson, Jamaal Muata Ali, Ruth Williams, Scipio J. Williams, Delma Williams-Edwards, Jewelene Williamson, Tony Williamson, Michael Winter, Wiseman Wiseman, Phyllis Woodford, Joyce Woodle, Beverly Woolett, Paul Woolett, Melvina Stokes Wright, Patricia Wright, Glenn Wyche, John Wyche, John F. Young, John W. Young, Sandra Rhodes Young, Joanne Zimmerman, Stephen Thomas Zone, Patricia Thorstad Zosso, Margaret Angeloni, Jesus Arroyo, Milagros Arroyo, Olympia Carletta, Kimberly Carpenter, Christopher Comes, Frank Comes, Sr., Joan Comes, Patrick Comes, Deborah Crawford, Barbara Davis, Alice Warren Franklin, Megan Gerlach, Patricia Gerlach, Travis Gerlach, Arminda Hernandez, Margaret Hlywiak, Joseph Hlywiak, Paul Hlywiak, Peter Hlywiak, Jr., Peter Hlywiak, Sr., Cynthia Lou Hunt, Rosa Ibarro, Estate of Alex W. Nashton, Estate of James Otis Moore, Estate of Johnney S. Moore, Andrew Scott Jacobs, Daniel Joseph Jacobs, Danita Jacobs, Kathleen Kirkpatrick, Grace Lewis, Lisa Magnotti, Wendy Mitchell, Marvin S. Moore, Jonnie Mae Moore-Jones, Ashley E. Oliver, Kayley Oliver, Michael John Oliver, Patrick S. Oliver, Paul Oliver, Riley Oliver, Tanya Russell, Wanda Russell, Estate of Ingrid M. Swinson, Estate of Kenneth J. Swinson, Estate

of Marlis Molly Wheeler, Scott Spaulding, Cecilia Stanley, Kelly Swank, Daniel Swinson, Dawn Swinson, Teresa Swinson, William Swinson, Bronzell Warren, Jessica Watson, Audrey Webb, Benjamin Wheeler, Brenda June Wheeler, Jonathan Wheeler, Kerry Wheeler, Jill Wold, Estate of Nora Young, Estate of Robert Young, James Young, Yekutiel Wultz, Estate of Daniel Wultz, Sheryl Wultz, Yekutiel Wultz, Amanda Wultz, Paul Martinez, Sr., Timothy Giblin.

The following respondents were respondents in the district court and appellees in the court of appeals: David Kirschenbaum, Isabelle Kirschenbaum, Jason Kirschenbaum, Joshua Kirschenbaum, Danielle Lynn Teitlebaum, Anna Beer, Harry Beer, Estelle Carroll, Phyllis Maisel.

The following respondents were defendants in the district court and appellees in the court of appeals: William Adams, Catherine Adams, Kendall K. Kitson, Jr., Christopher R. Nguyen, Che G. Colson, Estate of Michael Heiser, Francis Heiser, Gary Heiser, Estate of Justin R. Wood, Estate of Leland Timonthy Haun, Ibis S. Haun, Senator Haun, Milagritos Perez-Dalis, Anthony W. Cartrette, Lewis W. Cartrette, Denise M. Eichstaedt, Estate of Brian McVeigh, Estate of Earl F. Cartrette, Jr., James V. Wetmore, Sandra M. Wetmore, Bridget Brooks, Mary Young, Timothy Woody, Jonica L. Woody, Dawn Woody, Elizabeth Wolf, Daniel Adams, John E. Adams, Michael T. Adams, Patrick D. Adams, Bernadine R. Beekman, George M. Beekman, Starlina D. Taylor, Lawrence Taylor, Tracy M. Smith, James R. Rimkus, Anne M. Rimkus, Sharon Marthaler, Matthew Marthaler, Kirk Marthaler, Katie L. Marthaler, Herman C. Marthaler, III, Judy Lester, Jessica F. Lester, Cecil H. Lester, Jr., Cecil H. Lester, Steve K. Kitson, Nancy Kitson, Nancy A. Kitson.

The following respondents were third-party defendants in the district court and appellees in the court of appeals: Michael Morgera Thomas Morgera, Thaddeus C. Fennig.

The following respondents were third-party defendants, cross-claimants, and counter-claimants in the district court and appellees in the court of appeals: Jeremy Levin, Dr. Lucille Levin.

The following respondents were third-party defendants and cross-defendants in the district court and appellees in the court of appeals: Carlos Acosta, Maria Acosta, Estate of Judith Greenbaum, Steven M. Greenbaum, Estate of Millard D. Campbell, Kathleen M. Wood, Shawn M. Wood, , Bessie A. Campbell, Estate of Brent E. Marthaler, Bruce Johnson, Catherine Fennig, Estate of Christopher Lester, Estate of Joshua E. Woody, Estate of Kendall Kitson, Jr., Kevin Johnson, a minor, Estate of Kevin J. Johnson, Laura E. Johnson, Mark Fennig, Estate of Patrick Fennig, a minor, Estate of Patrick Fennig, Paul D. Fennig, Shyrl L. Johnson, Estate of Thanh Van Nguyen, Estate of Christopher Adams, Marie R. Campbell, Estate of Peter J. Morgera, Kendall K. Kitson, Irving Franklin, Estate of Binyamin Kahane, Tova Ettinger, Estate of Irma Franklin, Libby Kahane, Norman Kahane, Estate of Meir Kahane, Ethel J. Griffin, Shirlee Hayman, Baruch Kahane, Ciporah Kaplan, Alan Hayman, Sonia Kahane, Estate of Jeremy Taylor, Estate of Joseph E. Rimkus, Angel Alvarado, Geraldo Alvarado, Grisselle Alvarado, Luis Alvarado, Luisa Alvarado, Maria Alvarado, Marta Alvarado, Pedro Alvarado, Jr., Yolanda Alvarado, Zoraida Alvarado, Dennis Jack Anderson, Cheryl Bass, Catherine Bonk, John Bonk, Sr., Kevin Bonk, Thomas Bonk, Catherine Bonk Huny, Edward J. Brooks, Patricia A. Brooks, Timothy Brooks, Marion

DiGiovanni, Estate of James Silvia, Sherry Lynn Fiedler, Marilou Fluegel, Robert Fluegel, Thomas A. Fluegel, Wanda Ford, Evans Hairston, Felicia Hairston, Julia Bell Hairston, Bennie Harris, Michael Harris, Henry Durban Hukill, Mark Andrew Hukill, Matthew Scott Hukill, Melissa Hukill, Meredith Ann Hukill, Mitchell Charles Hukill, Monte Hukill, Virginia Ellen Hukill, Storm Jones, Penni Joyce, Carl Kirkwood, Sr., Carl A. Kirkwood, Jr., Jeff Kirkwood, Shirley Kirkwood, Patricia Kronenbitter, Betty Laise, Bill Laise, Kris Laise, Bill Macgroglou, James Macgroglou, Lorraine Macgroglou, Kathy McDonald, Edward J. McDonough, Edward W. McDonough, Sean McDonough, Marcy Lynn Parson, Donald R. Pontillo, Deborah Rhosto, Don Selbe, Eloise F Selbe, John E. Selbe, Anna Marie Simpson, Larry Simpson, Sr., Renee Eileen Simpson, Robert Simpson, Belinda Skarka, Lynne Michol Spencer, Allison Thompson, Ifaline Thompson, Johnny Thompson, Willy G. Thompson, Deborah True, Janice Valore, Orlando M. Valore, Jr., Orlando Michael Valore, Sr., Terance J. Valore, Sally Jo Wirick, Richard W. Wood, Vicki L. Taylor.

The following parties were third-party defendants in the district court: Gary Robert Owens, James Owens, Frank B. Pressley, Jr., David A. Pressley, Michael F. Pressley, Thomas C. Pressley, Yasemin B. Pressley, Montine Bowen, Sundus Buyuk, Bahar Buyuk, Berk F. Pressley, Frank Pressley, Sr., Jon B. Pressley, Marc Y. Pressley, Donald Bomer, Ellen Marie Bomer, Ahme Buyuk, Serpil Buyuk, Tulay Buyuk, Alexandra Cormier, Andrew John William Cormier, Michael James Cormier, Dorothy Willard, Cheryl L. Blood, Patricia K. Fast, Patricia Feore, Alice M. Hirn, Clyde M. Hirn, Inez P. Hirn, Bret W. Reed, Joyce Reed, Worley Lee Reed, Tabitha Carter, Lorie Gulick, Julita A. Qualico, Howard Sparks,

Howard Sparks, Jr., Leslie Lydia Sparks, Michael Ray Sparks, Gary O. Spiers, Victoria Q. Spiers, Victoria J. Spiers, Flossie Varney, Linda Jane Whiteside, Ruth Ann Whiteside, Pam Williams, Renay Frym, Stuart E. Hersh, Abraham Mendelson, Daniel Miller, Elena Rozenman, Noam Rozenman, Tzvi Rozenman, Jenny Rubin, Juanita R. Goldfarb, Mary V. Hernandez, Robert Tishmack, Jr., Akili Musupape, Debora Donti Mwaipape, Donte Akili Mwaipape, Donti Akili Mwaipape, Elisha Donti Mwaipape, Joseph Donti Mwaipape, Nko Donti Mwaipape, Victoria Donti Mwaipape, Judith Abasi Mwila, Adabeth Said Nang'Oko, Hanuni Ramadhani Ndange, Alli Kindamba Ng'Ombe, Mohamed Alli Ng'Ombe, Kindamba Alli Ng'Ombe, Robin Nicely, Celia Walker, Dorothy C. Wint, Jutta Yarber, Floyd Carpenter, Rose Harris, Douglas Pontillo, Floyd Martin Carpenter, Andrea Ciarla, Phyllis Santoserra, John Opatovsky, Jean Givens Owen, Steven G. Owen, Albert Page, Janet Page, David Penosky, Joseph Penosky, Christian R. Rauch, John Brown, Estate of Burton Wherland, Rowel Brown, Estate of Jeffrey Bruce Owen, Sulba Brown, Estate of Michael Lee Page, Vara Brown, Sarah Wherland, David Burns, Sharon Davis, Eugene Burns, Rodney E. Burns, Daniel Cuddeback, Jr., Daniel Cuddeback, Sr., John R. Cuddeback, Marvine McBride, Ann Marie Moore, Jeannie Scaggs, Charles F. West, LaJuana Smith, Charles H. West, Estate of Anthony Brown, Rick West, Angela Yoak, Gregory Wherland, Louise Gaddo Blatter, Kimmy Wherland, Barbara Cuddeback, Robert Dean, Michael Episcopo, Peter Gaddo, Randy Gaddo, Timothy Gaddo, Estate of William R. Gaines, Michael A. Gaines, William R. Gaines, Sr., Gloria Hamilton, Carolyn Spears, Mark Spears, Eveyln Sue Spears Elliot, Estate of Virgel Hamilton, Carol Weaver, Lorreta Brown, Bruce Hastings, Kathy Hodges, Maynard Hodges, Cindy Holmes, Daniel

Joy, Sean Kirkpatrick, Daniel Kremer, Joseph T. Kremer, Dorothy C. Wint, Shana Saul, Pam Williams, Jacqueline Stahrr, Betty Lewis, Jeanette Dougherty, Jerry L. Lewis, Christopher Hein, Scott M. Lewis, Estate of Laura Virginia Copeland, Estate of Christine Kremer, Estate of David A. Lewis, Estate of Thomas Kremer, Teresa Gunterh, Dorothy C. Wint, Alphonso Martinez, Leonora Pontillo, Daniel Martinez, Michael Martinez, Paul Martinez, Jr., Tomasita L. Martinez, Esther Martinez Parks, Susanne Yeoman, Joyce Clifford, Alexandra Rain Cormier, Robert Muffler, Jr., Ronald L. Tishmack, Tova Ettinger, Estate of Binyamin Kahane, Estate of Irma Franklin, Irving Franklin, Baruch Kahane, Dudley Decker, Ida Decker, Johnnie Decker, Sidney Decker, Ronald Duplanty, Estate of Frank Bland, Carolyn Mudd, Estate of Benjamin E. Fuller, Estate of Sean F Ester, Keith Estler, Louis Estler, Jr., Mary Ellen Estler, Ernest C. Fuller, Holly Gibson, John Gibson, Maurice Gibson, Estate of Michael Hastings, Estate of Paul Hein, Joyce Hastings, Jo Ann Hein, Victor J. Hein, Karen Hein-Sullivan, Jacqueline M. Kunysz, Estate of Bruce Hollingshead, Estate of John Hendrickson, Estate of Michael Robert Massman, Nicole Gomez, John Hendrickson, Tyson Hendrickson, Melinda Hollingshead, Barbara Goff, Renard Manley, Deborah Ryan, Estate of Louis Melendez, Angela Massman, Kristopher Massman, Lydia Massman, Douglas Jason Melendez, Zaida Melendez, Patricia Lou Smith, Estate of Billy San Pedro, Estate of Juan C. Rodriguez, Estate of Michael Mercer, Johnny Melendez, Johnny Melendez, Jr., Sarah Mercer, Samuel Palmer, Louisa Punonet, Robert Rucker, Estate of James Surch, Cesar San Pedro, Guillermo San Pedro, Javier San Pedro, Sila V San Pedro, Thurnell Shields, Emanuel Simmons, Will Surch, Bradley Ulick, Estate of Eric Walker, Marilyn Peterson, Tena Walker-Jones, An-

son Edmond, Arnold Edmond, Hazel Edmond, Estate of Obrian Weekes, Ronald E. Walker, Ronald Walker, Jr., Galen Weber, Wendy Edmond, Estate of Dennis Lloyd West, Estate of John Weyl, Faith Weekes, Ianthe Weekes, Keith Weekes, Meta Weekes, Kathy West, Morgan W. Rowan, Sharon J. Rowan, Nelson Weyl, Luis Rotondo, Rose Rotondo.

The following parties were cross-defendants in the district court: Andres Alvarado Tull, Alan C. Anderson, Michael Anderson, Thelma Anderson, Kelly Bachlor, Angela E. Barile, Joseph A. Barile, Michael Barile, John Becker, Elaine Allen, Patty Barnett, James Bland, Ruth Ann Bland, Stephen Boyd Bland, DEF, James S. Spears, Happiness Mathew Rutaheshelwa, Eric Mathew Rutaheshelwa, Enoc Mathew Rutaheshelwa, Elizabeth Mathew Rutaheshelwa, Edward Mathew Rutaheshelwa, Angelina Mathew Rutaheshelwa, Deborah Rubin, Kulwa Ramadhani, Steven G. Owen, Shabani Saidi Mtulya, Angelina Mathew-Ferix, Samual Thomas Marcus, Coronella Samuel Marcus, Cecilia Samuel Marcus, Dorothy C. Wint, Estate of William R. Gaines, Jr., Frank B. Pressley, Jr., Johnny Melendez, Jr., Venant Valentine Mathe Katunda, Veidiana Valentine Katunda, Valentine Mathew Katunda, Edwine Valentine Mathe Katunda, Diana Valentine Katunda, Deisery Valentine Mathe Katunda, Abella Valentine Katunda, Mathew Ferix, Estate of Yusef Shamte Ndange, Estate of Wengo Ramadhani, Estate of Veronica Alois Saidi, Estate of Upemdo Ramadhani, Estate of Selina Rogath Saidi, Estate of Saidi Shabani Mtuyla, Estate of Rogath Saidi Saidi, Estate of Patrick Fennig, Estate of Mwajabu Yusuph Shamte Ndange, Estate of Mtendeje Rajabu, Estate of Majaliwa Ramadhani, Estate of Kassim Ramadhani, Estate of Juma Yusuph Shamte Ndange, Estate of John Rogath Saidi, Estate of

Idifonce Rogath Saidi, Estate of Dotio Rmadhani, Estate of Daniel Rogath Saidi, Estate of Aisha Mawazo, Estate of Abdul Shabani Mtuyla, Estate of Abdu Yusuph Shamte Ndange, Loretta Brown, Catherine Bonk Huny, Ellen Marie Bomer, Monica Akili.

The following parties were defendants in the district court: The Islamic Republic of Iran, Citibank, N.A., John Bonk, Sr., Leonard Paul Tice, Robin Brock, Mary Jean Hodges, Clearstream Banking, S.A., Banca UBAE S.p.A.

APPENDIX I

RELEVANT CONSTITUTIONAL, STATUTORY, AND TREATY PROVISIONS

1. Article III of the United States Constitution provides:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

2. Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214, 1258, as codified at 22 U.S.C. § 8772, provides:

§ 8772. Interests in certain financial assets of Iran

(a) Interests in blocked assets

(1) In general

Subject to paragraph (2), notwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law, a financial asset that is—

(A) held in the United States for a foreign securities intermediary doing business in the United States;

(B) a blocked asset (whether or not subsequently unblocked) that is property described in subsection (b); and

(C) equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran or any agency or instrumentality of that Government, that such foreign securities intermediary or a related intermediary holds abroad,

shall be subject to execution or attachment in aid of execution in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, or hostage-taking, or the provision of material support or resources for such an act.

(2) Court determination required

In order to ensure that Iran is held accountable for paying the judgments described in paragraph (1) and in furtherance of the broader goals of this Act to sanction

Iran, prior to an award turning over any asset pursuant to execution or attachment in aid of execution with respect to any judgments against Iran described in paragraph (1), the court shall determine whether Iran holds equitable title to, or the beneficial interest in, the assets described in subsection (b) and that no other person possesses a constitutionally protected interest in the assets described in subsection (b) under the Fifth Amendment to the Constitution of the United States. To the extent the court determines that a person other than Iran holds—

(A) equitable title to, or a beneficial interest in, the assets described in subsection (b) (excluding a custodial interest of a foreign securities intermediary or a related intermediary that holds the assets abroad for the benefit of Iran); or

(B) a constitutionally protected interest in the assets described in subsection (b),

such assets shall be available only for execution or attachment in aid of execution to the extent of Iran's equitable title or beneficial interest therein and to the extent such execution or attachment does not infringe upon such constitutionally protected interest.

(b) Financial assets described

The financial assets described in this section are the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG), that were restrained by restraining notices and levies secured by the plaintiffs in those proceedings, as modified by court order dated June 27, 2008, and extended by court orders dated June 23, 2009, May 10, 2010,

and June 11, 2010, so long as such assets remain restrained by court order.

(c) Rules of construction

Nothing in this section shall be construed—

(1) to affect the availability, or lack thereof, of a right to satisfy a judgment in any other action against a terrorist party in any proceedings other than proceedings referred to in subsection (b); or

(2) to apply to assets other than the assets described in subsection (b), or to preempt State law, including the Uniform Commercial Code, except as expressly provided in subsection (a)(1).

(d) Definitions

In this section:

(1) Blocked asset

The term "blocked asset"—

(A) means any asset seized or frozen by the United States under section 5(b) of the Title 50, Appendix or under section 1701 or 1702 of Title 50; and

(B) does not include property that—

(i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of the license has been specifically required by a provision of law other than the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) or the United Nations Participation Act of 1945 (22 U.S.C. 287 *et seq.*); or

(ii) is property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention

on Consular Relations, or that enjoys equivalent privileges and immunities under the laws of the United States, and is being used exclusively for diplomatic or consular purposes.

(2) Financial asset; securities intermediary

The terms "financial asset" and "securities intermediary" have the meanings given those terms in the Uniform Commercial Code, but the former includes cash.

(3) Iran

The term "Iran" means the Government of Iran, including the central bank or monetary authority of that Government and any agency or instrumentality of that Government.

(4) Person

(A) In general

The term "person" means an individual or entity.

(B) Entity

The term "entity" means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization.

(5) Terrorist party

The term "terrorist party" has the meaning given that term in section 201(d) of the Terrorism Risk Insurance Act of 2002 (28 U.S.C. 1610 note).

(6) United States

The term "United States" includes all territory and waters, continental, or insular, subject to the jurisdiction of the United States.

3. The Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, as amended and codified at 28 U.S.C. §§ 1602 *et seq.* provides:

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state

may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a

discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the

vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the

same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) Repealed.

(g) LIMITATION ON DISCOVERY.—

(1) IN GENERAL.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security opera-

tion, related to the incident that gave rise to the cause of action.

(2) SUNSET.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) EVALUATION OF EVIDENCE.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) BAR ON MOTIONS TO DISMISS.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) CONSTRUCTION.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL.—

(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this

section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) LIMITATIONS.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) SPECIAL MASTERS.—

(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) PROPERTY DISPOSITION.—

(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) DEFINITIONS.—For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other lia-

bility or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of

section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign

Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) WAIVER.—The President may waive any provision of paragraph (1) in the interest of national security.

(g) PROPERTY IN CERTAIN ACTIONS.—

(1) IN GENERAL.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which para-

graph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) THIRD-PARTY JOINT PROPERTY HOLDERS.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwith-

standing any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

4. Section 201 of the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322, 2337, as amended and reproduced at 28 U.S.C. §1610 note, provides:

(a) IN GENERAL.—Notwithstanding any other provision of law, and except as provided in subsection (b) [of this note], in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605A or 1605(a)(7) (as such section was in effect on January 27, 2008) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

(b) PRESIDENTIAL WAIVER.—

(1) IN GENERAL.—Subject to paragraph (2), upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive the requirements of subsection (a) [of this note] in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(2) EXCEPTION.—A waiver under this subsection shall not apply to—

(A) property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations that has been used by the United States for any nondiplomatic purpose (in-

cluding use as rental property), or the proceeds of such use; or

(B) the proceeds of any sale or transfer for value to a third party of any asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(d) DEFINITIONS.—In this section [this note] the following definitions shall apply:

(1) ACT OF TERRORISM.—The term "act of terrorism" means—

(A) any act or event certified under section 102(1) [Pub. L. 107-297, Title I, § 102(1), Nov. 26, 2002, 116 Stat. 2323, which is set out in a note under 15 U.S.C.A. § 6701]; or

(B) to the extent not covered by subparagraph (A), any terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(iii))).

(2) BLOCKED ASSET.—The term "blocked asset" means—

(A) any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702); and

(B) does not include property that—

(i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of such license has been specifically required by statute

other than the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) or the United Nations Participation Act of 1945 (22 U.S.C. 287 *et seq.*); or

(ii) in the case of property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges and immunities under the law of the United States, is being used exclusively for diplomatic or consular purposes.

(3) CERTAIN PROPERTY.—The term "property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations" and the term "asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations" mean any property or asset, respectively, the attachment in aid of execution or execution of which would result in a violation of an obligation of the United States under the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, as the case may be.

(4) TERRORIST PARTY.—The term "terrorist party" means a terrorist, a terrorist organization (as defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi))), or a foreign state designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371).

5. The Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899, provides in relevant part as follows:

The United States of America and Iran, desirous of emphasizing the friendly relations which have long prevailed between their peoples, of reaffirming the high principles in the regulation of human affairs to which they are committed, of encouraging mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and of regulating consular relations, have resolved to conclude, on the basis of reciprocal equality of treatment, a Treaty of Amity, Economic Relations, and Consular Rights, and have appointed as their Plenipotentiaries:

The President of the United States of America:

Mr. Selden Chapin, Ambassador Extraordinary and Plenipotentiary of the United States of America at Tehran;

and

His Imperial Majesty, the Shah of Iran:

His Excellency Mr. Mostafa Samiy, Under Secretary of the Ministry of Foreign Affairs;

Who, having communicated to each other their full powers found to be in due form, have agreed upon the following articles:

* * * * *

ARTICLE III

1. Companies constituted under the applicable laws and regulations of either High Contracting Party shall have their juridical status recognized within the territories of the other High Contracting Party. It is understood, however, that recognition of juridical status does not of itself confer rights upon companies to engage in

the activities for which they are organized. As used in the present Treaty, "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit.

2. Nationals and companies of either High Contracting Party shall have freedom of access to the courts of justice and administrative agencies within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights, to the end that prompt and impartial justice be done. Such access shall be allowed, in any event, upon terms no less favorable than those applicable to nationals and companies of such other High Contracting Party or of any third country. It is understood that companies not engaged in activities within the country shall enjoy the right of such access without any requirement of registration or domestication.

3. The private settlement of disputes of a civil nature, involving nationals and companies of either High Contracting Party, shall not be discouraged within the territories of the other High Contracting Party; and, in cases of such settlement by arbitration, neither the alienage of the arbitrators nor the foreign situs of the arbitration proceedings shall of themselves be a bar to the enforceability of awards duly resulting therefrom.

ARTICLE IV

1. Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded ef-

fective means of enforcement, in conformity with the applicable laws.

2. Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

3. The dwellings, offices, warehouses, factories and other premises of nationals and companies of either High Contracting Party located within the territories of the other High Contracting Party shall not be subject to entry or molestation without just cause. Official searches and examinations of such premises and their contents, shall be made only according to law and with careful regard for the convenience of the occupants and the conduct of business.

4. Enterprises which nationals and companies of either High Contracting Party are permitted to establish or acquire, within the territories of the other High Contracting Party, shall be permitted freely to conduct their activities therein, upon terms no less favorable than other enterprises of whatever nationality engaged in similar activities. Such nationals and companies shall enjoy the right to continued control and management of such enterprises; to engage attorneys, agents, accountants and other technical experts, executive personnel, interpreters and other specialized employees of their choice; and to do

all other things necessary or incidental to the effective conduct of their affairs.

ARTICLE V

1. Nationals and companies of either High Contracting Party shall be permitted, within the territories of the other High Contracting Party: (a) to lease, for suitable periods of time, real property needed for their residence or for the conduct of activities pursuant to the present Treaty; (b) to purchase or otherwise acquire personal property of all kinds; and (c) to dispose of property of all kinds by sale, testament or otherwise. The treatment accorded in these respects shall in no event be less favorable than that accorded nationals and companies of any third country.

* * * * *

ARTICLE XXI

1. Each High Contracting Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other High Contracting Party may make with respect to any matter affecting the operation of the present Treaty.

2. Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.

* * * * *

6. Article 8 of the Uniform Commercial Code provides in relevant part as follows:

* * * * *

§ 8-102. Definitions.

(a) In this Article:

* * * * *

(14) "Securities intermediary" means:

(i) a clearing corporation; or

(ii) a person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity.

* * * * *

(17) "Security entitlement" means the rights and property interest of an entitlement holder with respect to a financial asset specified in Part 5.

* * * * *

§ 8-112. Creditor's Legal Process.

(a) The interest of a debtor in a certificated security may be reached by a creditor only by actual seizure of the security certificate by the officer making the attachment or levy, except as otherwise provided in subsection (d). However, a certificated security for which the certificate has been surrendered to the issuer may be reached by a creditor by legal process upon the issuer.

(b) The interest of a debtor in an uncertificated security may be reached by a creditor only by legal process upon the issuer at its chief executive office in the United States, except as otherwise provided in subsection (d).

(c) The interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon

the securities intermediary with whom the debtor's securities account is maintained, except as otherwise provided in subsection (d).

(d) The interest of a debtor in a certificated security for which the certificate is in the possession of a secured party, or in an uncertificated security registered in the name of a secured party, or a security entitlement maintained in the name of a secured party, may be reached by a creditor by legal process upon the secured party.

(e) A creditor whose debtor is the owner of a certificated security, uncertificated security, or security entitlement is entitled to aid from a court of competent jurisdiction, by injunction or otherwise, in reaching the certificated security, uncertificated security, or security entitlement or in satisfying the claim by means allowed at law or in equity in regard to property that cannot readily be reached by other legal process.

* * * * *

[OFFICIAL COMMENT]

3. Subsection (c) provides that a security entitlement can be reached only by legal process upon the debtor's security intermediary. Process is effective only if directed to the debtor's own security intermediary. If Debtor holds securities through Broker, and Broker in turn holds through Clearing Corporation, Debtor's property interest is a security entitlement against Broker. Accordingly, Debtor's creditor cannot reach Debtor's interest by legal process directed to the Clearing Corporation. See also Section 8-115.

* * * * *

§ 8-504. Duty of Securities Intermediary to Maintain Financial Asset.

(a) A securities intermediary shall promptly obtain and thereafter maintain a financial asset in a quantity corresponding to the aggregate of all security entitlements it has established in favor of its entitlement holders with respect to that financial asset. The securities intermediary may maintain those financial assets directly or through one or more other securities intermediaries.

(b) Except to the extent otherwise agreed by its entitlement holder, a securities intermediary may not grant any security interests in a financial asset it is obligated to maintain pursuant to subsection (a).

(c) A securities intermediary satisfies the duty in subsection (a) if:

(1) the securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) in the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to obtain and maintain the financial asset.

(d) This section does not apply to a clearing corporation that is itself the obligor of an option or similar obligation to which its entitlement holders have security entitlements.

§ 8-505. Duty of Securities Intermediary With Respect to Payments and Distributions.

(a) A securities intermediary shall take action to obtain a payment or distribution made by the issuer of a financial asset. A securities intermediary satisfies the duty if:

(1) the securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) in the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to attempt to obtain the payment or distribution.

(b) A securities intermediary is obligated to its entitlement holder for a payment or distribution made by the issuer of a financial asset if the payment or distribution is received by the securities intermediary.

§ 8-506. Duty of Securities Intermediary to Exercise Rights as Directed by Entitlement Holder.

A securities intermediary shall exercise rights with respect to a financial asset if directed to do so by an entitlement holder. A securities intermediary satisfies the duty if:

(1) the securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) in the absence of agreement, the securities intermediary either places the entitlement holder in a position to exercise the rights directly or exercises due care in accordance with reasonable commercial standards to follow the direction of the entitlement holder.

§ 8-507. Duty of Securities Intermediary to Comply With Entitlement Order.

(a) A securities intermediary shall comply with an entitlement order if the entitlement order is originated by the appropriate person, the securities intermediary has had reasonable opportunity to assure itself that the entitlement order is genuine and authorized, and the securities intermediary has had reasonable opportunity to

comply with the entitlement order. A securities intermediary satisfies the duty if:

(1) the securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) in the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to comply with the entitlement order.

(b) If a securities intermediary transfers a financial asset pursuant to an ineffective entitlement order, the securities intermediary shall reestablish a security entitlement in favor of the person entitled to it, and pay or credit any payments or distributions that the person did not receive as a result of the wrongful transfer. If the securities intermediary does not reestablish a security entitlement, the securities intermediary is liable to the entitlement holder for damages.

§ 8-508. Duty of Securities Intermediary to Change Entitlement Holder's Position to Other Form of Security Holding.

A securities intermediary shall act at the direction of an entitlement holder to change a security entitlement into another available form of holding for which the entitlement holder is eligible, or to cause the financial asset to be transferred to a securities account of the entitlement holder with another securities intermediary. A securities intermediary satisfies the duty if:

(1) the securities intermediary acts as agreed upon by the entitlement holder and the securities intermediary; or

(2) in the absence of agreement, the securities intermediary exercises due care in accordance with rea-

sonable commercial standards to follow the direction of the entitlement holder.

* * * * *

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IN THE

Supreme Court of the United States

BANK MARKAZI, AKA THE CENTRAL BANK OF IRAN,
Petitioner,

v.

DEBORAH PETERSON, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTION PRESENTED

Whether Section 502 of the Iran Threat Reduction and Syria Human Rights Act, 22 U.S.C. § 8772, violates the constitutional separation of powers because it amends existing law applicable to a particular pending case.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT 1

REASONS FOR DENYING THE PETITION 8

I. THE COURTS OF APPEALS UNIVERSALLY CONSTRUE THE *KLEIN-ROBERTSON* LINE OF CASES TO PERMIT CONGRESS TO AMEND THE LAW APPLICABLE TO PENDING CASES. 10

II. THIS CASE IS A POOR VEHICLE TO ADDRESS THE CONTINUED VIABILITY OF THIS COURT'S PRECEDENT. 19

III. THE INTERNATIONAL RELATIONS CONCERNS MANUFACTURED BY PETITIONERS ARE MAKEWEIGHT. 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

CASES

Acosta v. *Islamic Republic of Iran*,
574 F. Supp. 2d 15 (D.D.C. 2008) 3

Alliance for the Wild Rockies v. *Salazar*,
672 F.3d 1170 (9th Cir. 2012) 14

Apache Survival Coal. v. *United States*,
21 F.3d 895 (9th Cir. 1994) 13, 19

Arizona v. *Rumsey*,
467 U.S. 203 (1984) 2

Axel Johnson, Inc. v. *Arthur Andersen & Co.*,
6 F.3d 78 (2d Cir. 1993) 7

Beer v. *Islamic Republic of Iran*,
574 F Supp. 2d 1 (D.D.C. 2008) 3

Benjamin v. *Jacobson*,
124 F.3d 162 (2d Cir. 1997) 15

Benjamin v. *Jacobson*,
172 F.3d 144 (2d Cir. 1999) 15

Bernstein v. *N. V. Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij*,
210 F.2d 375 (2d Cir. 1954) 24

Biodiversity Assocs. v. *Cables*,
357 F.3d 1152 (10th Cir. 2004) 13, 17, 18

Breard v. *Greene*,
523 U.S. 371 (1998) 28

Campuzano v. *Islamic Republic of Iran*,
281 F. Supp. 2d 258 (D.D.C. 2003) 4

City of Chicago v. *U.S. Dep't of Treasury*,
423 F.3d 777 (7th Cir. 2005).....16

Clodfelter v. *Republic of Sudan*,
720 F.3d 199 (4th Cir. 2013).....14

Cobell v. *Norton*,
392 F.3d 461 (D.C. Cir. 2004).....13

Ecology Ctr. v. *Castaneda*,
426 F.3d 1144 (9th Cir. 2005).....13, 22

Estate of Bland v. *Islamic Republic of Iran*,
831 F. Supp. 2d 150 (D.D.C. 2011).....3

Estate of Brown v. *Islamic Republic of Iran*,
872 F. Supp. 2d 37 (D.D.C. 2012).....3

Estate of Heiser v. *Islamic Republic of Iran*,
466 F Supp. 2d 229 (D.D.C. 2006).....3

Estate of Heiser v. *Islamic Republic of Iran*,
807 F Supp. 2d 9 (D.D.C. 2011).....2

Ex parte Republic of Peru,
318 U.S. 578 (1943).....24

Global Relief Found., Inc. v. *O'Neill*,
315 F.3d 748 (7th Cir. 2002).....26

Greenbaum v. *Islamic Republic of Iran*,
451 F. Supp. 2d 90 (D.D.C. 2006).....3, 4

Holy Land Found. for Relief & Dev. v.
Ashcroft,
333 F.3d 156 (D.C. Cir. 2003).....26

Janko v. *Gates*,
741 F.3d 136 (D.C. Cir. 2014).....15

Kirschenbaum v. *Islamic Republic of Iran*,
572 F. Supp. 2d 200 (D.D.C. 2008).....3

Kumar v. *Republic of Sudan*,
No. 2:10cv171, 2011 WL 4369122
(E.D. Va. Sept. 19, 2011).....14

Lampf, Pleva, Lipkind, Prupis & Petigrow
v. *Gilbertson*,
501 U.S. 350 (1991).....11

Levin v. *Islamic Republic of Iran*,
529 F. Supp. 2d 1 (D.D.C. 2007).....3

Lindh v. *Murphy*,
96 F.3d 856 (7th Cir. 1996).....15, 16

Miller v. *French*,
530 U.S. 327 (2000).....1, 8, 11, 12

Murphy v. *Islamic Republic of Iran*,
740 F. Supp. 2d 51 (D.D.C. 2010).....3

Nat'l Coal. to Save Our Mall v. *Norton*,
269 F.3d 1092 (D.C. Cir. 2001).....18

Peterson v. *Islamic Republic of Iran*,
264 F. Supp. 2d 46 (D.D.C. 2003).....2, 3

Plaut v. *Spendthrift Farm, Inc.*,
514 U.S. 211 (1995).....11, 12, 14, 17, 18, 25

Pope v. *United States*,
323 U.S. 1 (1944).....21

Republic of Mexico v. *Hoffman*,
324 U.S. 30 (1945).....24

Robertson v. *Seattle Audubon Soc'y*,
503 U.S. 429 (1992).....1, 8, 11, 12, 16, 17, 22, 23

Samantar v. *Yousuf*,
130 S. Ct. 2278 (2010).....24

The Santissima Trinidad,
20 U.S. (7 Wheat.) 283 (1822).....23

United States v. *Klein*,
80 U.S. (13 Wall.) 128 (1872).....1, 8, 10, 11, 12, 13

United States v. *Sioux Nation of Indians*,
448 U.S. 371 (1980).....12, 13

Valore v. *Islamic Republic of Iran*,
478 F. Supp. 2d 101 (D.D.C. 2007).....3

Verlinden B.V. v. *Cent. Bank of Nigeria*,
461 U.S. 480 (1983).....23, 24

Weininger v. *Castro*,
462 F. Supp. 2d 457 (S.D.N.Y. 2006).....26

Whitney v. *Robertson*,
124 U.S. 190 (1888).....28

STATUTES

22 U.S.C. § 8711 6

22 U.S.C. § 8772 6

28 U.S.C. § 1254 1

28 U.S.C. § 1605A(a)(1).....3

28 U.S.C. § 1609 5

28 U.S.C. § 1610 .....5, 6, 27

28 U.S.C. § 1611 .....5, 26

28 U.S.C. § 2403(a).....27

Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214 6

Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322.....5, 6, 26

RULES

Fed. R. Civ. P. 5.1 27

OTHER AUTHORITIES

Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 43 Op. Att'y Gen. 275 (1980) 27

Exec. Order No. 13,599, 77 Fed. Reg. 6659 (Feb. 5, 2012) 5

Howard M. Wasserman, *The Irrepressible Myth of* Klein, 79 U. Cin. L. Rev. 53 (2010) 14

Press Release, Dep't of State, Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers (Apr. 27, 1949) 24

Press Release, U.S. Treasury Dep't, Treasury Department Reaches Landmark $152 Million Settlement with Clearstream Banking, S.A. (Jan. 23, 2014) 4

Treaty of Amity, U.S.-Iran, art. I, Aug. 15, 1955, 8 U.S.T. 899 28

BRIEF IN OPPOSITION

Respondents Deborah Peterson et al. respectfully submit that the petition for a writ of certiorari filed by Bank Markazi, the Central Bank of Iran, should be denied.

OPINIONS BELOW

The opinion of the court of appeals is reported at 758 F.3d 185 (2d Cir. 2014). Pet. App. 1a-12a. The unpublished opinions and orders of the district court are reproduced in the Appendix. *Id.* at 13a-127a.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2014. A petition for rehearing en banc was denied on September 29, 2014. Pet. App. 128a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner asks this Court to grant certiorari in this case to decide whether the separation-of-powers principle enunciated in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), permits Congress to "fundamentally change[] the governing law" applicable to a pending case. Pet. 10. But the Court long ago answered this very question, unambiguously holding that the separation of powers does not prevent Congress from "'amend[ing] applicable law.'" *Miller* v. *French*, 530 U.S. 327, 349 (2000) (quoting *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992)). Petitioner would replace this longstanding line of authority, which is uniformly observed and applied in the courts of appeals, with an amorphous standard that delves into the significance of the questions left for judicial determination and the number of cases to

which the statute applies. Yet petitioner does not even attempt to provide the "special justification" that would be required to rewrite constitutional law in this area. *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984). Moreover, it seeks such relief in a case that does not actually raise the question petitioner presents and includes a fully sufficient alternative ground for reaching the same result.

The petition for a writ of certiorari should be denied.

1. Respondents are more than 1,300 Americans who are victims of terrorist attacks sponsored by the government of Iran, or surviving family members and representatives of victims of those attacks. Those terrorist attacks include the 1983 Beirut Marine Barracks Bombing, in which suicide bombers detonated a truck bomb and unleashed "the largest non-nuclear explosion that had ever been detonated on the face of the earth," killing 241 American servicemen, and wounding dozens more. *Peterson* v. *Islamic Republic of Iran*, 264 F. Supp. 2d 46, 56 (D.D.C. 2003). They also include the 1996 bombing of the Khobar Towers in Saudi Arabia, where U.S. Air Force personnel were housed. *Estate of Heiser* v. *Islamic Republic of Iran*, 807 F. Supp. 2d 9, 11 (D.D.C. 2011). That attack killed nineteen servicemen and wounded hundreds more in an explosion that was even larger than the Beirut Bombing. And, they include several other bombings, an assassination, and a kidnaping—all sponsored by the government of Iran.

Among the servicemen killed in the Beirut Marine Barracks Bombing was Lance Cpl. James C. Knipple of Alexandria, Virginia, who was 20 years old when he was murdered. His sister, Deborah

Peterson, is the personal representative of his estate. In 2001, Peterson brought a wrongful death action against the Islamic Republic of Iran and the Iranian Ministry of Information and Security for their roles in masterminding and perpetrating the Beirut Marine Barracks Bombing. She was joined in that action by hundreds of other similarly aggrieved families and survivors.

The plaintiffs in the *Peterson* actions obtained jurisdiction over Iran and its ministry under the Foreign Sovereign Immunities Act ("FSIA"), which withdraws the immunity from jurisdiction conferred by Section 1604 of the Act in certain circumstances where "money damages are sought against a foreign state for personal injury or death that was caused by an act of . . . extrajudicial killing." *See* 28 U.S.C. § 1605A(a)(1) (formerly codified at 28 U.S.C. § 1605(a)(7)).

Although duly served, Iran refused to appear. Nevertheless, the *Peterson* plaintiffs proved by "clear and convincing evidence" that Iran was liable for these attacks. *See, e.g.*, *Peterson*, 264 F. Supp. 2d at 48. Other respondents similarly proved that Iran was liable for the terrorist attacks that injured them or took the lives of their loved ones.[1] Respondents

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[1] *Estate of Brown* v. *Islamic Republic of Iran*, 872 F. Supp. 2d 37 (D.D.C. 2012); *Estate of Bland* v. *Islamic Republic of Iran*, 831 F. Supp. 2d 150 (D.D.C. 2011); *Murphy* v. *Islamic Republic of Iran*, 740 F. Supp. 2d 51 (D.D.C. 2010); *Acosta* v. *Islamic Republic of Iran*, 574 F. Supp. 2d 15 (D.D.C. 2008); *Beer* v. *Islamic Republic of Iran*, 574 F. Supp. 2d 1 (D.D.C. 2008); *Kirschenbaum* v. *Islamic Republic of Iran*, 572 F. Supp. 2d 200 (D.D.C. 2008); *Levin* v. *Islamic Republic of Iran*, 529 F. Supp. 2d 1 (D.D.C. 2007); *Valore* v. *Islamic Republic of Iran*, 478 F. Supp. 2d 101 (D.D.C. 2007); *Estate of Heiser* v. *Islamic Republic of Iran*, 466 F. Supp. 2d 229 (D.D.C. 2006); *Greenbaum* v.

each were awarded judgments against Iran, and, in the aggregate, those judgments direct Iran to pay billions of dollars in damages. Pet. App. 2a. Iran, though it does not dispute the validity of the judgments, refuses to satisfy them.

2. Petitioner Bank Markazi is Iran's central bank and is entirely owned by the Iranian Government. Pet. App. 2a. Bank Markazi held "at least a 'beneficial interest'" in almost $2 billion in an account at Citibank in New York (the "Iranian Assets").[2] *Ibid.*

In 2008, the *Peterson* plaintiffs learned of the Iranian Assets at Citibank in New York and sought restraints on those assets from the U.S. District Court for the Southern District of New York. Pet. App. 3a. The district court restrained those assets, and in 2010 the *Peterson* plaintiffs commenced an action seeking turnover of the Iranian Assets. *Id.* at 12a-14a, 62a-63a.[3]

Islamic Republic of Iran, 451 F. Supp. 2d 90 (D.D.C. 2006); *Campuzano* v. *Islamic Republic of Iran*, 281 F. Supp. 2d 258 (D.D.C. 2003); Pet. App. 16a.

[2] To conceal its interest in the funds in the Citibank account, Bank Markazi's interest ran through a chain of middlemen: The account at Citibank is an omnibus account for Clearstream Bank, S.A., a Luxembourg-based financial intermediary, which maintains the account for, among others, the Italian bank Banca UBAE S.p.A., "whose customer, in turn, is Bank Markazi." Pet. App. 2a. Clearstream since has paid $152 million to settle its potential liability for violating sanctions against Iran in its dealings with Bank Markazi. Press Release, U.S. Treasury Dep't, Treasury Department Reaches Landmark $152 Million Settlement with Clearstream Banking, S.A. (Jan. 23, 2014).

[3] After the *Peterson* plaintiffs obtained restraints on the Iranian Assets, other respondents in this Court who also had terrorism-related judgments against Iran served Citibank or Clearstream with similar restraining notices that asserted a

While that litigation was proceeding in the district court, President Obama issued an Executive Order blocking all assets of Iran and its agencies and instrumentalities (including Bank Markazi) "that are in the United States." Exec. Order No. 13,599, 77 Fed. Reg. 6659, 6659 (Feb. 5, 2012). The President stated that the Order was designed to combat "the deceptive practices of the Central Bank of Iran and other Iranian banks to conceal transactions of sanctioned parties." *Ibid.* Citibank accordingly placed the Iranian Assets in a segregated account as required by regulations of the Department of Treasury's Office of Foreign Assets Control. Pet. App. 64a.

Years before, Congress had passed the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 ("TRIA"), which, in certain circumstances, displaced the FSIA provisions that accord a limited immunity against attachment and execution on the property of foreign sovereigns in the United States, *see* 28 U.S.C. §§ 1609-1611. Whereas Section 1609 of the FSIA states that, subject to certain exceptions, "the property in the United States of a foreign state shall be immune from attachment arrest and execution," 28 U.S.C. § 1609, the TRIA provides that "[n]otwith-standing any other provision of law" plaintiffs who have "obtained a judgment against a terrorist party on a claim based upon an act of ter-

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potential claim on the Iranian Assets. The district court authorized Citibank to file and serve interpleader petitions on those respondents. Pet. App. 15a. Still other respondents were added by motions to intervene or by agreements with the other plaintiffs. Pet. App. 15a-19a. Respondents then reached an agreement amongst themselves as to their respective claims of priority to and interests in the Iranian Assets, and the distribution of any recovery. Pet. App. 54a.

rorism" can execute that judgment against "the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)." TRIA § 201(a), 116 Stat. at 2337 (codified at 28 U.S.C. § 1610 note). With Executive Order 13,599 blocking the Iranian Assets, respondents sought summary judgment on their claim for turnover under the TRIA. Pet. App. 3a.

While that motion was pending before the district court, the Iran Threat Reduction and Syria Human Rights Act of 2012 was enacted. Pub. L. No. 112-158, 126 Stat. 1214. Section 8711 of the Act explains that it was enacted to sanction Iran in order to compel it to abandon its efforts to obtain a nuclear weapon and "other threatening activities." 22 U.S.C. § 8711. Section 8772 provides that "the financial assets that are identified in and the subject of proceedings in" this case "shall be subject to execution . . . in order to satisfy any judgment . . . against Iran for damages for personal injury or death caused by an act of . . . extrajudicial killing," provided that the court "determine[s]" both that (1) "Iran holds equitable title to, or the beneficial interest in, the assets," and (2) "no other person possesses a constitutionally protected interest in the[m]." *Id.* § 8772(a)(1), (a)(2), (b). Section 8772 further defines "Iran" to include "the central bank or monetary authority . and any agency or instrumentality" of Iran. *Id.* § 8772(d)(3).

The district court granted summary judgment to respondents. It found that "[t]here simply is no other possible owner of the interests here other than Bank Markazi," and therefore concluded that Section 8772 made the assets available for execution. Pet. App. 113a. The district court held that Section 8772 does not violate separation of powers because it "merely 'chang[es] the law applicable to pending cases;' it

does not 'usurp[] the adjudicative function assigned to the federal courts[.]'" *Id.* at 115a (quoting *Axel Johnson, Inc.* v. *Arthur Andersen & Co.*, 6 F.3d 78, 81 (2d Cir. 1993)). Further, the court observed that the statute did not "dictate specific factual findings," as Bank Markazi had argued, but rather "requires the Court to make determinations regarding (1) whether and to what extent Iran has a beneficial or equitable interest in the assets at issue, and (2) whether constitutionally-protected interest holders other than Iran are present." *Id.* at 114a-15a (emphasis omitted). Accordingly, the court ordered Citibank to turn over the Iranian Assets. *Id.* at 22a-26a.[4]

3. The Second Circuit unanimously affirmed. Pet. App. 1a-12a. The court of appeals rejected Bank Markazi's argument that Section 8772 unconstitutionally invaded the Article III judicial function "by compelling the courts to reach a predetermined result in this case." *Id.* at 7a. It held that *Klein* and its progeny illustrate that, while "Congress may not usurp the adjudicative function assigned to the federal courts," it "may change the law applicable to pending cases, even when the result under the revised law is clear." *Id.* at 8a (internal quotation marks and brackets omitted). The court held that the statute "does not compel judicial findings under

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[4] The district court ordered the establishment of a qualified settlement trust under 26 U.S.C. § 468B to receive and hold the Iranian Assets pending the final disposition of the litigation and further order of the court concerning distribution of the Iranian Assets. *Peterson* v. *Islamic Republic of Iran*, No. 10 Civ. 4518 (S.D.N.Y. July 9, 2013), ECF Nos. 460, 461 (orders establishing qualified settlement trust). The Iranian Assets now reside in that trust under the supervision of the court-appointed trustee.

old law; rather, it changes the law applicable to this case . . . [and] explicitly leaves the determination of certain facts to the courts." *Id.* at 9a.

The court analogized Section 8772 to the statute upheld by this Court against a similar challenge in *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992). Just as the statute in *Robertson* was permissible because it "'affected the adjudication of the cases" but "did so by effectively modifying the provisions at issue in those cases,' not by compelling findings or results under those provisions," Section 8772 "does not compel judicial findings under old law; rather, it changes the law applicable to this case." Pet. App. 8a-9a (quoting *Robertson*, 503 U.S. at 440).

The panel and the en banc court denied rehearing without recorded dissent. Pet. App. 128a.

REASONS FOR DENYING THE PETITION

The Second Circuit's decision upholding Section 8772 is consistent with this Court's settled separation-of-powers jurisprudence. Those decisions make clear that, although Congress may not "prescribe rules of decision to the Judicial Department," *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 146 (1872), this "prohibition does not take hold when Congress amends applicable law." *Miller* v. *French*, 530 U.S. 327, 349 (2000) (internal quotation marks and brackets omitted). There is no doubt that Section 8772 "amend[s] applicable law"; petitioner freely admits that, as to the Iranian Assets, "§ 8772 fundamentally changes the governing law." Pet. 10. Under *Miller*—which petitioner does not cite, though it is this Court's most recent pronouncement in this area—Section 8772 therefore does not violate the constitutional separation of powers.

Petitioner offers no plausible basis for reconsidering this settled line of authority, which has been consistently and uniformly applied by the lower courts. Instead, it simply urges this Court to adopt a different standard, under which a change in applicable law would violate the constitutional separation of powers if the change appears to apply only in a single case or leaves the judiciary without "meaningful" issues to decide. But no court of appeals has adopted either of these standards, and this Court's authority forecloses them.

Moreover, even if there were a reason to revisit the *Klein* line of decisions—and there is not—this case would be a singularly poor vehicle for doing so. The very question petitioner asks this Court to decide—whether a change in applicable law that "effectively directs a particular result" in a case violates the constitutional separation of powers (Pet. i)—was not presented in this case. As the district court concluded, Section 8772 left "frankly plenty for th[e] Court to adjudicate," "requir[ing] the Court to make determinations regarding" the ownership of the assets and whether any other person has an interest in them. Pet. App. 115a. And, while petitioner urges the Court to grant certiorari to address whether a statute *ever* may violate *Klein* where it amends applicable law—a question expressly reserved in *Robertson*—that question was neither squarely raised nor addressed below. Accordingly, as in *Robertson* itself, this case is an inadequate vehicle to address that question.

But even if petitioner's questions were properly before the Court, foreign sovereign immunity—which Bank Markazi asserted below and which Section 8772 changed as to Iran and its instrumentalities—would be the wrong context in which to consider

them. At least until enactment of the FSIA, sovereign immunity in judicial proceedings *always* had been subject to ad hoc determination by the political branches. So even if it were possible that a change in applicable law in certain contexts could violate the separation of powers, it likely would not do so in the area of foreign sovereign immunity. Review of the decision below thus would be unlikely to provide answers to any uncertainty concerning the scope of this Court's decision in *Klein*. Indeed, even a decision in Petitioner's favor would not change the ultimate result, because the TRIA still would mandate turnover of the Iranian Assets.

I. THE COURTS OF APPEALS UNIVERSALLY CONSTRUE THE *KLEIN-ROBERTSON* LINE OF CASES TO PERMIT CONGRESS TO AMEND THE LAW APPLICABLE TO PENDING CASES.

1. The principle of separation of powers on which petitioner relies has its roots in this Court's 1871 decision in *Klein*. In *Klein*, the Court reviewed a statute through which Congress had provided that a presidential pardon was not admissible in evidence to support the right of a claimant to recover the value of property seized during the Civil War. 80 U.S. (13 Wall.) at 143. Congress had further provided that when any pardon recited disloyalty by the claimant, and the claimant had failed to contest that assertion, the pardon would be conclusive evidence of the claimant's disloyalty and the court would be deprived of jurisdiction. *Id.* at 143-44.

The claimant in *Klein* had prevailed in the Court of Claims under previously applicable law, which provided that a pardon satisfied the claimant's burden of proving that he had not aided the Confederacy. This Court invalidated the statute that purport-

ed to change this result, concluding that it was unconstitutional because it impermissibly "prescribe[d] rules of decision to the Judicial Department of the government in cases pending before it." 80 U.S. (13 Wall.) at 146. In so doing, the Court contrasted those situations where an "arbitrary rule of decision was prescribed" to the courts with the permissible circumstances in which "the court was left to apply its ordinary rules to the new circumstances created by [an] act." *Id.* at 146-47.

This Court has subsequently explained that, "[w]hatever the precise scope of *Klein*, . . . its prohibition does not take hold when Congress amend[s] applicable law." *Miller* v. *French*, 530 U.S. 327, 349 (2000) (alterations in original; internal quotation marks omitted). In *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992), for example, the Court rejected a separation-of-powers challenge to a statute that deemed compliance with newly promulgated restrictions on forest harvesting sufficient to establish compliance with the laws at issue in two pending suits challenging harvesting of the spotted owl's habitat. *Id.* at 441. The Court held that the newly enacted statute "compelled changes in law, not findings or results under old law," and thus did not implicate *Klein*'s prohibition on congressional rules of decision in pending cases. *Id.* at 438.

Similarly, in *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), the Court rejected a *Klein*-based challenge to a statute that retroactively altered the statute of limitations in cases pending at the time this Court decided *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), which had held that the statute of limitations for federal securities fraud claims is one year after discovery of the facts constituting the violation and three years

after the violation. *Plaut*, 514 U.S. at 213-14. The newly enacted statute provided for the application of the pre-*Lampf* statute of limitations in cases pending at the time *Lampf* was decided (even if the case had already been closed) and the application of the *Lampf* standard in subsequently filed cases. *Id.* at 214-15. Notwithstanding Congress's retroactive change in the law applicable in pending (and already closed) cases, the Court held that the statute did not, for that reason, violate the separation of powers because it "indisputably . . . set out substantive legal standards for the Judiciary to apply, and in that sense change[d] the law (even if solely retroactively)." *Id.* at 218; *see also Miller*, 530 U.S. at 349 (rejecting a *Klein*-based challenge to a statute that established new legal standards to be applied to pending injunctions regarding prison conditions).[5]

Under this precedent, the constitutional line is clear. If a statute merely "compel[s] changes in law," *Robertson*, 503 U.S. at 438, it is within Congress's legislative authority. If, on the other hand, it dictates "findings or results under old law," *ibid.*, then Congress has "passed the limit which separates the legislative from the judicial power." *Klein*, 80 U.S. (13 Wall.) at 147.[6]

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[5] Although the Court in *Plaut* concluded that the statute was consistent with the rule articulated in *Klein*, the Court nevertheless held that it contravened Article III of the Constitution by "retroactively commanding the federal courts to reopen final judgments." *Plaut*, 514 U.S. at 219. Petitioners do not raise such an argument here.

[6] The Court also substantially clarified *Klein*'s limited reach in *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980), which explained that the statute in *Klein* was "unconstitutional in two respects: First, it prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's

2. The courts of appeals have consistently understood the *Klein-Robertson* line of cases to make precisely this distinction. In *Apache Survival Coalition* v. *United States*, 21 F.3d 895 (9th Cir. 1994), for example, the Court upheld a statute that declared that particular telescopes that were to be built on an Arizona mountain satisfied all environmental statutory requirements. *Id.* at 902, 914. The Court explained that the law, by suspending the environmental requirements for the telescopes, "substituted preexisting legal standards that governed a particular project . with the new standards," rather than "directing particular applications under either the old or new standards." *Id.* at 901-02 (internal quotation marks omitted); *see also Cobell* v. *Norton*, 392 F.3d 461, 467 (D.C. Cir. 2004) (upholding statute that "*chang*[*ed*] the substantive law" rather than merely "direct[ing] the courts how to *interpret* or apply pre-existing law"). Indeed, in *Biodiversity Associates* v. *Cables*, 357 F.3d 1152 (10th Cir. 2004), the court of appeals made clear that the critical issue was whether the statute amended law, explaining that "[b]ecause" the statute at issue "did amend applicable law, the *Klein* principle does not apply here." *Id.* at 1171 (internal quotation marks and brackets omitted); *see also Ecology Ctr.* v. *Castaneda*, 426 F.3d 1144, 1149 (9th Cir. 2005) (upholding statute under *Robertson* because it "does not impermissibly direct findings *without changing underlying law*") (emphasis added).

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favor." *Id.* at 404. This was particularly unfair because, as the *Klein* Court put it, it would "allow[] one party to the controversy to decide it in its own favor[.]" *Klein*, 80 U.S. at 146. Second, the statute in *Klein* was "liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive." *Sioux Nation*, 448 U.S. at 404-05 (internal quotation marks omitted).

Given the exceedingly narrow scope of *Klein*, it is no surprise that "in almost 140 years, the only case to strike down a law explicitly on *Klein* grounds was *Klein* itself; every *Klein*-based challenge to federal legislation has, quite appropriately, failed." Howard M. Wasserman, *The Irrepressible Myth of* Klein, 79 U. Cin. L. Rev. 53, 55 (2010); *see also Alliance for the Wild Rockies* v. *Salazar*, 672 F.3d 1170, 1173 (9th Cir. 2012) ("*Klein*, however, has remained an isolated Supreme Court application of the separation-of-powers doctrine to strike down a statute that dictated the result in pending litigation.").[7]

3. Petitioner claims that courts are nonetheless confused regarding the proper application of *Klein*, but its claim rests primarily on citations indicating only that the line between cases that compel a result under existing law, and those that enact a new standard governing the case, is not always clear. Pe-

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[7] Petitioner notes that in *Kumar* v. *Republic of Sudan*, No. 2:10cv171, 2011 WL 4369122, at *11 (E.D. Va. Sept. 19, 2011), a district court found that Congress "disregarded the separation of powers" in part of its expansion of the FSIA's terrorism provision. Pet. 24-25. But that case presented a different question—*i.e.*, whether the statute contravened *Plaut*, 514 U.S. 211, by reopening a final judgment. On appeal, the Fourth Circuit reversed, concluding that *Plaut* was not implicated in that case. *Clodfelter* v. *Republic of Sudan*, 720 F.3d 199, 207 (4th Cir. 2013). Neither court considered a *Klein* challenge. The brief of the United States in the Fourth Circuit, however, aptly stated the guiding separation-of-powers principle that controls this case: "Congress may change substantive law and even require courts to 'apply that [new] law in reviewing judgments still on appeal that were rendered before the law was enacted' and 'alter the outcome accordingly.' Thus changes in substantive law and the application of such changes to pending cases pose no separation of powers problem." Brief for United States as Intervenor, *Clodfelter*, 720 F.3d 199 (No. 11-2118), 2013 WL 1232670, at *15, (quoting *Plaut*, 514 U.S. at 226) (alteration in original; citations omitted).

titioner invokes the vacated panel decision in *Benjamin* v. *Jacobson*, 124 F.3d 162 (2d Cir. 1997), *vacated*, 172 F.3d 144 (2d Cir. 1999) (en banc), for example, to support the assertion that proper application of *Klein* is "'a vexed question.'" Pet. 18 (quoting *Benjamin*, 124 F.3d at 174). But (before it was vacated) *Benjamin* unambiguously held that "if legislation can be characterized as changing the underlying law rather than as prescribing a different outcome under the pre-existing law, it will not violate the separation-of-powers principle formulated in *Klein*." *Benjamin*, 124 F.3d at 174. The panel decision in *Benjamin* simply concluded that "[t]he distinction" between these two things—changing the law, versus simply dictating a result under existing law—"may in some cases be hard to discern." *Ibid.*[8]

Regardless of whether there is confusion over when a statute *changes* law, there is no confusion over whether a statute that *does* change law violates *Klein*. Courts have universally held that it does not. *See also Janko* v. *Gates*, 741 F.3d 136, 146 (D.C. Cir. 2014) (describing *Klein* as "a bit of a constitutional Sphinx," but explaining that it "applies where the Congress prescribes the outcome of pending litigation by means other than amending the applicable law") (citations and emphasis omitted).

The Seventh Circuit's statement in *Lindh* v. *Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997), that Congress "cannot tell courts how to decide a particular case," does not reflect a different approach to applying *Klein*, much less form one side of a hardened circuit split. *Id.* at 872. In upholding AEDPA's limitation of

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[8] The en banc Second Circuit found that the *Klein* challenge had not been renewed in the en banc hearing and therefore was no longer before the court. *Benjamin*, 172 F.3d at 159.

federal court habeas review to decisions that were "contrary to, or involved an unreasonable application of, clearly established Federal law," the *Lindh* court rejected the notion that it was unconstitutional to "require[] anything less than plenary review of all contentions based on federal law." *Id.* at 871. Instead, the court explained that "Congress cannot tell courts how to decide a particular case, but it may make rules that affect classes of cases." *Id.* at 872. As a result, "Congress cannot say that a court must award Jones $35,000 for being run over by a postal truck." *Ibid.* Of course, that statement is fully consistent with the unanimous approach of federal appellate courts that Congress may change the law applicable to a pending case, but may not direct the federal court how to resolve the case. And nine years later, the Seventh Circuit made precisely that point in *City of Chicago* v. *United States Department of Treasury*, 423 F.3d 777 (7th Cir. 2005), holding it "unnecessary to address the City's *Klein* challenge" because the statute at issue "amounts to a substantive change in the underlying law." *Id.* at 783-84. No court of appeals has staked out a contrary approach. And under the test prevailing throughout the courts of appeals, there is no separation-of-powers problem here because petitioner acknowledges that Section 8772 "changes the governing law." Pet. 10.

4. Petitioner also suggests that this Court should grant review because *Robertson* "left open" the question of whether "'a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases.'" Pet. 17-19 (quoting *Robertson*, 503 U.S. at 441). But the fact that this Court declined to answer a question not properly before it does not suggest that the question is certworthy. Indeed, the reason-

ing of *Robertson* itself makes the answer at least to the separation-of-powers question clear. *Robertson* rests its constitutional holding firmly on the ground that that statute at issue "compelled changes in law, not findings or results under old law." *Robertson*, 503 U.S. at 438. And the fact that it applied to (indeed, apparently was enacted to resolve) only two pending cases did not matter. *Ibid.*

And whatever uncertainty remained after *Robertson* should have been resolved by this Court's decision in *Plaut*. There, the majority opinion explicitly rejected the concurrence's suggestion that the constitutionality of a statute should turn on whether it "appl[ies] to a limited number of individuals." 514 U.S. at 241 (Breyer, J., concurring). The majority stated that "[i]t makes no difference whatever to th[e] separation-of-powers violation that it is in gross rather than particularized." *Id.* at 239 (majority opinion). "Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid," the majority explained. *Id.* at 239 n.9. This was demonstrated not least by the "extensive jurisprudence" on the Bill of Attainder Clause, "including cases which say that it requires not merely singling out but also *punishment* and a case which says that Congress may legislate a legitimate class of one," none of which would be relevant if laws focused on a particular case violated the separation of powers. *Ibid.* (citations and quotation marks omitted).

And not surprisingly, since *Plaut*, courts of appeals routinely have rejected separation-of-powers challenges premised on the assertion that a statute targets specific pending litigation. As the Tenth Circuit put it, "the sheer specificity" of a statute does not "take[] it beyond the realm of Congress's legislative powers." *Biodiversity Assocs.*, 357 F.3d at 1161. It is "up to Congress to determine how specific it may deem it 'necessary and proper' for the laws to be."

Ibid.; *see Nat'l Coal. to Save Our Mall* v. *Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001) ("[W]e see no reason why the specificity should suddenly become fatal merely because there happened to be a pending lawsuit.").

5. At bottom, petitioner's argument is that *Klein* should not turn on whether a statute amends substantive law at all, but on other considerations—the number and importance of the issues that remain for the court to adjudicate, and the number of cases to which the statute applies. For example, petitioner proposes that the constitutionality of an act of Congress should turn on whether the statute "left anything meaningful for the court to decide" or merely "requir[ed] findings on collateral uncontested issues." Pet. 19-21 (internal quotation marks omitted). It further argues that "it offends basic norms of legislative and adjudicative process for Congress to change the governing law solely for purposes of one case, and solely to benefit the preferred litigant." *Id.* at 22.

But courts uniformly have concluded that *Klein* has no application where Congress has changed the governing law applicable to a pending case, and petitioner offers no case even remotely suggesting that the applicability of *Klein* turns on its suggested considerations of the "meaningful[ness]" of the issues to be decided, or the narrowness or breadth of the statute's application. *Klein* itself certainly does not suggest that it turned on such considerations. And, indeed, the reasoning of *Robertson* and *Plaut* preclude assigning weight to either of petitioner's proposed factors. As the court of appeals recognized, the statute in *Robertson* "was specifically enacted to resolve two pending cases, and the Supreme Court found no constitutional violation." Pet. App. 10a. And this Court in *Plaut* stated plainly that "laws that impose a . . . liability upon a single individual or firm are not on that account invalid." 514 U.S. at 239 n.9; *see*

also Apache, 21 F.3d at 902 (upholding statute under which "the requirements of section 7 of the Endangered Species Act shall be deemed satisfied as to the issuance of a Special Use Authorization" for three identified telescopes) (internal quotation marks omitted).

In short, there is a significant, uncontroverted line of cases, from this Court and the courts of appeals, holding that the constitutional separation of powers is not offended when a statute amends existing law. Petitioner readily acknowledges that is what Section 8772 does, but it offers no basis for reconsidering the conclusion that follows that the statute does not violate the separation of powers.

II. This Case Is A Poor Vehicle To Address The Continued Viability Of This Court's Precedent.

Even if reconsideration of the unbroken line of cases applying the *Klein* rule were warranted, for multiple reasons, this case would be a uniquely poor vehicle for performing that examination. Perhaps most importantly, petitioner's own question presented—"[w]hether § 8772—a statute that effectively directs a particular result in a single pending case—violates the separation of powers"—assumes that Section 8772 in fact dictates the result of the case below. But the district court specifically and properly disagreed with this characterization, as Section 8772 left issues for the court to adjudicate.

And beyond this barrier to reaching the question presented, the purportedly "open question" that petitioner asks this Court to resolve—whether "a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases," Pet. 17 (internal quotation

marks omitted)—was neither squarely presented to, nor decided by, the court of appeals. The same considerations that led this Court to decline to answer that question in *Robertson* thus apply with equal force here.

Moreover, the general question of Congress's power to amend law pertaining to a particular case need not—and likely would not—be reached here because this case involves the scope of foreign sovereign immunity from execution, an arena in which the political branches have uniquely broad powers. Whether Congress may permissibly withdraw sovereign immunity from a particular sovereign in particular circumstances does not resolve the broader question of whether Congress may dictate the result of, for example, an ordinary state law tort claim.

Finally, in light of its application of Section 8772, the court of appeals found it unnecessary to reach the claim that the TRIA also mandated turnover. Pet. App. 5a-6a. Yet, because the Iranian Assets are blocked under Executive Order 13,599, Iran remains a state sponsor of terrorism, and Bank Markazi is an agency of Iran, the TRIA commanded turnover no less than Section 8772. Even if Section 8772 were invalidated, then, the courts below would reach precisely the same result under the TRIA.

1. In the district court, as here, petitioner argued that Section 8772 "effectively dictated specific factual findings in connection with a specific litigation—invading the province of the courts." Pet. App. 114a. The district court disagreed, concluding that "[t]he statute does not itself 'find' turnover required; such determination is specifically left to the Court." *Id.* at 114a-15a. In particular, the district court held that it was required to "make determinations regarding (1) whether and to what extent Iran has a beneficial or equitable interest in the assets at issue, and

(2) whether constitutionally-protected interest holders *other than* Iran are present." *Id.* at 115a. The Court further explained that "[t]hese determinations are not mere fig leaves; it is quite possible that the Court could have found that defendants raised a triable issue as to whether the Blocked Assets were owned by Iran, or that Clearstream and/or UBAE have some form of beneficial or equitable interest." *Ibid.* Indeed, the ownership of the Assets was disputed in the district court, with Clearstream arguing that Section 8772 did not permit turnover because it was the sole owner of the blocked assets. *Id.* at 35a-40a. In short, the court held, "[t]here is frankly plenty for this Court to adjudicate." *Id.* at 115a.

Petitioner now asserts that "there was never any serious question" that Section 8772 was satisfied. Pet. 20. While the court of appeals did not dispute that premise, neither did it adopt it. Petitioner claims the Second Circuit "held § 8772 constitutional *even if*, as Bank Markazi contended, it left no meaningful role to the courts." *Ibid.* Yet the court of appeals, block-quoting the statute, observed that "§ 8772 explicitly leaves the determination of certain facts to the courts." Pet. App. 9a. And its observation that it would be "unusual for there to be more than one likely outcome when Congress changes the law for a pending case with a developed factual record," (as Congress had done with the statute at issue in *Robertson*), *id.* at 10a, hardly constitutes a holding that Section 8772 would be "constitutional even if it left no meaningful role for the courts." Pet. 20 (emphasis omitted). That outcome-determinative facts are undisputed, or beyond dispute, does not make a court's adjudication and finding of those facts not "meaningful." *Ibid.*; *see Pope* v. *United States*, 323 U.S. 1, 11 (1944) (a statute does not violate the *Klein* principle just because it renders a plaintiff's claim "uncontested or incontestable" and makes "the

amount recoverable depend[] upon a mathematical computation"); *Ecology Ctr.*, 426 F.3d at 1150 (statute did not violate separation of powers even though the district court had already made the requisite findings before the statute was passed). In any event, the explicit contrary conclusion of the district court—which was most familiar with the evidence and arguments regarding ownership and other interests in the Iranian Assets and found "plenty . . to adjudicate" (Pet. App. 115a)—suggests that the question of whether a statute may direct that the result of a pending case turn on undisputed facts may not even be presented here. This case, accordingly, is a uniquely poor vehicle for this Court to consider the question the petition advances.

2. In *Robertson*, the court of appeals had held that the statute at issue "was unconstitutional under *Klein* because it directed decisions in pending cases without amending any law." *Robertson*, 503 U.S. at 441. This Court reversed, concluding that the statute at issue *did* amend existing law, and that it thus did not need to consider whether the statute would have been unconstitutional if it had not done so. *Ibid.* An *amicus* had invited the Court to consider the further and distinct question of whether changes in law that are particularly narrow in application could be unconstitutional, but this Court declined to consider the question because the "alternative theory was neither raised below nor squarely considered by the Court of Appeals, nor was it advanced by respondents in this Court." *Ibid.*

Petitioner similarly did not squarely raise this issue in the court of appeals. Petitioner's principal *Klein* argument below was that Section 8772 unconstitutionally tried to "predetermine the results in a[] given case." Br. 49. Its support for this argument was that "Section 8772 nominally required the District Court to make only two 'determinations'" and

that Congress made "crystal clear its intent to determine the outcome of this action in Plaintiffs' favor." *Id.* at 51. Petitioner thus did not focus on whether Section 8772 was unconstitutional because it "swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases"; it contended that the statute was unconstitutional because it effectively dictated the result of the cases within its sweep. *Compare Robertson*, 503 U.S. at 441, *with* Br. 51. Indeed, Petitioner's district court briefing included no mention of this allegedly "open question," and its court of appeals briefing on the merits included no more regarding this than a quotation without argument in a footnote in the reply brief. Reply 19 n.8.

The Second Circuit accordingly did not recite, much less address, the "open question" petitioner now asks this Court to answer. Instead, it applied well-established law to uphold the statute because it "does not usurp the judicial function; rather, it retroactively changes the law applicable in this case, a permissible exercise of legislative authority." Pet. App. 8a. Just as this Court declined to address the question in *Robertson* because it was not squarely raised and addressed below, the Court should decline to grant certiorari to answer the question identified in *Robertson* here.

3. This case also presents a poor vehicle to consider the application of *Klein* because it arises in the context of congressionally conferred sovereign immunity from attachment, which has long been within the power of the political branches to grant or deny. "[F]oreign sovereign immunity is a matter of grace and comity on the part of the United States," *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983), and "may be withdrawn," *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 353 (1822) (Story, J.). Indeed, prior to enactment of the

FSIA, immunity was accorded on an ad hoc basis by the judicial branch, typically on the suggestion of the State Department. Consistent with this Court's direction that "[i]t is . . . not for the courts to deny an immunity which our government has seen fit to allow," *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945), U.S. courts generally accepted the State Department's suggestions as "conclusive." *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943); *see generally Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2284-85 (2010) (summarizing history). At the same time, this Court emphasized that "[i]t is . . not for the courts . . . to allow an immunity on new grounds which the government has not seen fit to recognize." *Hoffman*, 324 U.S. at 35. Accordingly, prior to the FSIA's enactment, courts rejected claims of immunity from hostile nations upon suggestion of the State Department. *See, e.g.*, *Bernstein* v. *N. V. Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij*, 210 F.2d 375, 375-76 (2d Cir. 1954) (relieving American courts "from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials") (quoting Press Release, Dep't of State, Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers (Apr. 27, 1949)).

Congress enacted the FSIA to address "inconsistent application of sovereign immunity," and to install a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden*, 461 U.S. at 488. But nothing in the constitutional structure required that result. *Id.* at 486 (sovereign immunity is "not a restriction imposed by the Constitution"). Sovereign immunity has always been applied according to rules set by the political branches, and that the inherent power to regulate immunity resides

there provides another basis to affirm the judgment below even if the *Klein* approach were to be reconsidered in other cases.[9]

4. The Second Circuit also did not consider—because it had no need to reach—the alternative basis that supported the requirement of turnover: that the TRIA, even before Section 8772 changed the law applicable in these circumstances, made turnover appropriate. Pet. App. 5a ("We need not resolve this dispute under the TRIA, however, as Congress has changed the law governing this case by enacting 22 U.S.C. § 8772.").

The TRIA provides that "[n]otwithstanding any other provision of law, . . . in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, . . . the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution." The Iranian Assets unquestionably are blocked by President Obama's Executive Order. Accordingly, as the district court recognized, the question is simply whether those assets are "assets of" petitioner. Pet. App. 113a.

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[9] Petitioner asserts that this case is a particularly good vehicle to consider applicability of *Klein* because it involves "paradigmatic private rights." Pet. 31a-32a. But that is far from clear given that Iran's "private rights" here depend on a claim of foreign sovereign immunity. In any event, even if the Court credits Petitioner's assertion that this case does not have the *additional* vehicle problem of occurring in a context where the courts of appeals are not even sure *Klein* is applicable, that does not ameliorate any of the serious vehicle problems the case does have or suggest that there is any confusion over the scope of *Klein* in cases involving "private rights." *See, e.g.*, *Plaut*, 514 U.S. 211.

There is no doubt that petitioner is the beneficial owner of the Iranian Assets. *See* Pet. App. 113a ("Bank Markazi has repeatedly insisted that it is the sole beneficial owner of the Blocked Assets."). Accordingly, there can be no serious dispute that the Iranian Assets also are "assets of" petitioner for purposes of the TRIA. *See* TRIA § 201(a).[10] And while assets belonging to central banks generally are immune from execution, *see* 28 U.S.C. § 1611(b), the TRIA's explicit statement that it applies "[n]otwithstanding any other provision of law" renders that provision of the FSIA unavailable to petitioner. *See, e.g.*, *Weininger* v. *Castro*, 462 F. Supp. 2d 457, 498-99 (S.D.N.Y. 2006) (recognizing that TRIA's later-enacted "notwithstanding clause" overrides Section 1611's earlier-enacted clause conferring immunity "notwithstanding the provisions of Section 1610").

Thus, even if this Court were to intervene to invalidate Section 8772, the same outcome would ensue, as the district court already determined that the Iranian Assets are assets of Bank Markazi subject to execution under the TRIA. Review of the decision below thus is unlikely to mitigate—much less resolve—the various policy concerns that petitioner invokes and which are addressed substantively below.

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[10] Petitioner argued below that beneficial ownership was not sufficient to make the Assets that the President blocked "assets of" Bank Markazi, but cases that interpret the President's authority to block assets make clear that beneficial ownership is a sufficient interest. *Holy Land Found. for Relief & Dev.* v. *Ashcroft*, 333 F.3d 156, 162-63 (D.C. Cir. 2003); *Global Relief Found., Inc.* v. *O'Neill*, 315 F.3d 748, 751 (7th Cir. 2002).

III. The International Relations Concerns Manufactured By Petitioners Are Makeweight.

Petitioner dedicates significant attention to the "important international ramifications" that it claims result from the decision of the court of appeals. Of course, the scope of *Klein* has no international ramifications; petitioner's argument instead is that this particular *application* of *Klein* has international ramifications.

But Petitioner's invocation of supposed national interests of the United States in denying respondents recovery against the Iranian Assets is entirely unpersuasive. Although the Attorney General was not invited to contribute his views in the lower courts, *see* 28 U.S.C. § 2403(a); Fed. R. Civ. P. 5.1, there is no reason to believe the Executive Branch has any foreign relations concerns about the decision here. In fact, the President both signed Section 8772 into law and blocked the Iranian Assets by executive order, deeply undermining petitioner's suggestion that the Executive would view the statute as an unwarranted intrusion into the Executive's authority over foreign affairs. Indeed, it is clear that the Executive Branch played a significant role in facilitating the access of victims like respondents to the assets of government sponsors of terrorism, Pet. App. 69a-71a, which is precisely what governing law requires, 28 U.S.C. § 1610(f)(2)(A). Section 8772 thus is not an intrusion into the political branches' control over foreign affairs; it is an exercise of that power—here to withdraw sovereign immunity from certain assets of a particularly hostile sovereign.[11]

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[11] Petitioner's failure to notify the Attorney General of its assertion of unconstitutionality in the lower courts is not a reason to call for the Solicitor General's views on this petition. The

Finally, petitioner's assertion that certiorari is proper because Section 8772 would bring the United States into violation of the Treaty of Amity cannot be sustained. The Treaty of Amity, as its name reflects, purported to establish "firm and enduring peace and sincere friendship between the United States of America and Iran." Treaty of Amity, U.S.-Iran, art. I, Aug. 15, 1955, 8 U.S.T. 899. It is ironic indeed for petitioner to invoke a treaty designed to promote "peace" as a defense against compensating the victims of its parent state's own acts of terrorism.

In any event, the Second Circuit carefully considered, and rejected, each of petitioner's claims that the Treaty of Amity was abrogated by Section 8772. *See* Pet. App. 6a-7a ("In any event, we see no conflict between § 8772 and the Treaty of Amity."). Moreover, it is well-established "that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." *Breard* v. *Greene*, 523 U.S. 371, 376 (1998) (alteration in original; internal quotation marks omitted). Accordingly, this Court has not hesitated to apply statutes even where those statutes abrogate an earlier-entered treaty. *See, e.g.*, *Whitney* v. *Robertson*, 124 U.S. 190 (1888). The mere assertion—rejected by the court of appeals—that Section 8772 abrogates the Treaty of Amity simply is not a compelling reason to grant certiorari.

Solicitor General, of course, has an obligation, in all but the rarest of cases, to defend the constitutionality of acts of Congress. Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 43 Op. Att'y Gen. 275 (1980). And as demonstrated above, there is at least a reasonable basis on which the Solicitor General could—and therefore must—defend Section 8772 here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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BANK MARKAZI,
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Petitioner,

v.

DEBORAH D. PETERSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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TABLE OF CONTENTS

		Page
I.	This Case Presents Important and Unresolved Questions About *Klein*'s Scope	2
II.	This Case Squarely Presents the Questions on Which Bank Markazi Seeks Review	6
III.	The Case's Foreign Relations Impact Underscores the Need for Review	10
Conclusion		12

TABLE OF AUTHORITIES

Page(s)

CASES

Calderon-Cardona v. *Bank of N.Y. Mellon*, 770 F.3d 993 (2d Cir. 2014) 10

Heiser v. *Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013) 10

Lebron v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995) 8

Miller v. *French*, 530 U.S. 327 (2000) 4

Nixon v. *Adm'r of Gen. Servs.*, 433 U.S. 425 (1977) 11

Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) 4

Pope v. *United States*, 323 U.S. 1 (1944) 5

Robertson v. *Seattle Audubon Soc'y*, 503 U.S. 429 (1992) ..... *passim*

United States v. *Klein*, 80 U.S. 128 (1872) ..... *passim*

Yee v. *Escondido*, 503 U.S. 519 (1992) 8

STATUTES

Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502, 126 Stat. 1214, 1258 (codified at 22 U.S.C. § 8772) ..... *passim*

22 U.S.C. § 8772(a)(1) 1, 9

22 U.S.C. § 8772(a)(1)(C) 9

22 U.S.C. § 8772(a)(2) 1

22 U.S.C. § 8772(a)(2)(A) 7

22 U.S.C. § 8772(b) 1

22 U.S.C. § 8772(c)(1) 1, 4

28 U.S.C. § 1610(g) 10

TABLE OF AUTHORITIES—Continued

Page(s)

28 U.S.C. § 1610 note § 201(a) 10

U.C.C. art. 8 ..... 9, 10

TREATY PROVISIONS

Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899 10

Art. IV.1, 8 U.S.T. at 903 10

OTHER AUTHORITIES

Executive Order No. 13,599, 77 Fed. Reg. 6659 (Feb. 5, 2012) 11

2015 Daily Comp. Pres. Doc. 36 (Jan. 20, 2015) 11

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REPLY FOR PETITIONER

A statute that more blatantly attempts to dictate the outcome in a specific pending case would be hard to imagine. Section 8772 singles out this case by docket number—the "proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)"—and expressly disclaims any effect on "any [other] proceedings." 22 U.S.C. §8772(b), (c)(1). "In order to ensure that Iran is held accountable for paying the judgments," it directs, the assets at issue must be paid over to plaintiffs subject only to findings that Bank Markazi has a beneficial interest in them and that no one else does. *Id.* §8772(a)(1), (2). If that does not constitute

an impermissible congressional exercise of the judicial power, it is hard to see what would.

Respondents do not seriously dispute the importance of the separation-of-powers question before the Court. They claim that this Court has already addressed the issue. That is incorrect. Their purported vehicle defects ignore the statute's effect and the court of appeals' reasoning. Finally, their half-hearted attempts to downplay this case's international ramifications are likewise without merit. The petition should be granted.

I. THIS CASE PRESENTS IMPORTANT AND UNRESOLVED QUESTIONS ABOUT *KLEIN*'S SCOPE

A. Respondents assert that this Court's cases already establish that Congress can direct the outcome of a pending case so long as it "'amend[s] applicable law'"—even if Congress amends the law solely for purposes of that one case, and even if the amendment leaves nothing for the judiciary to decide but uncontested collateral issues. Br. in Opp. 11. This Court's cases say no such thing.

The language about "amend[ing] applicable law" that respondents quote comes from the following passage of *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992):

> We have no occasion to address any broad question of Article III jurisprudence. *The Court of Appeals held* that [the statute at issue] was unconstitutional under *Klein* because it directed decisions in pending cases without amending any law. Because we conclude that [the statute] *did* amend applicable law, *we need not consider whether this reading of Klein is correct.*

Id. at 441 (emphasis altered). *Robertson* thus did not hold that Congress can direct the outcome of a single

pending case so long as it "amend[s] applicable law." The Court held only that the *court of appeals'* ruling—that Congress had impermissibly directed the outcome of a case without amending applicable law—was incorrect *on its own terms* because Congress had in fact amended applicable law. *Ibid.*

Immediately after that passage, moreover, the Court noted an amicus's argument that "even a change in law * * * would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue in [a] pending case[]." 503 U.S. at 441. The Court "decline[d] to address" that argument because the parties had not raised it. *Ibid.* The Court would not have stated that it was "declin[ing] to address" that argument if, as respondents contend, the Court had already rejected the argument.

Nor did *Robertson* consider the particular defects at issue here. The findings Congress had reserved to the judiciary in *Robertson* were no mere makeweights. The statute "expressly reserved judgment upon 'the legal and factual adequacy' of the administrative documents" and "expressly provided for *judicial* determination of the lawfulness of * * * sales." 503 U.S. at 438-439. Here, by contrast, the statute directed the court to decide the case in plaintiffs' favor subject only to findings that the Second Circuit assumed to be foregone conclusions. Pet. App. 7a-10a.

The statute in *Robertson*, moreover, did not change the law solely for one case. The Court specifically explained that, although the statute "made reference to pending cases identified by name and caption number," it did so "only to identify the five 'statutory requirements that are the basis for' those cases." 503 U.S. at 440. Even if the new law was enacted with those pending

cases in mind, its effect was not limited to them: The law would have applied equally to any other case challenging the agency decisions based on those five statutory requirements. Here, by contrast, the statute expressly limits its application to this one case, disclaiming any effect on "any [other] proceedings." 22 U.S.C. §8772(c)(1).

Neither *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), nor *Miller* v. *French*, 530 U.S. 327 (2000), speaks to the question here either. In *Plaut*, the Court mentioned *Klein* in three sentences of dicta explaining why *Klein* involved a different separation-of-powers question. 514 U.S. at 218. The Court's passing reference to "amend[ing] applicable law" cannot reasonably be viewed as resolving the issue *Robertson* left open. See *ibid.* Respondents quote a footnote from *Plaut* for the notion that "'[e]ven laws that impose a duty or liability upon a single individual or firm are not on that account invalid.'" Br. in Opp. 17 (quoting 514 U.S. at 239 n.9). But the problem here is not that Congress singled out an "individual or firm" for liability. Congress purported to direct the outcome of a *single pending case*. That specificity creates distinct separation-of-powers problems because it constitutes an exercise of the judicial power to decide particular cases or controversies that Article III reserves to the courts.

Miller is further afield still. That case had nothing to do with legislation targeting a specific case. It involved a generally applicable statute that automatically stayed prison reform orders if the court did not decide a motion to terminate the order within 30 days. 530 U.S. at 333-334. The prisoners challenging the statute "concede[d]" that the provision would be valid under *Klein* if it amended applicable law, and the Court—accepting that concession—held that that is what it did. *Id.* at 349. The case

thus did not present the question left open in *Robertson*, and the parties did not litigate it.[1]

Simply put, this Court has never confronted, let alone upheld, a statute that changed the law solely for purposes of one case to ensure that the favored litigant prevailed. There is no practical difference between Congress changing the law solely for purposes of one case to make a party win and Congress directing the judiciary to rule for that party. Either way, Congress has exercised the judicial power that the Constitution reserves to the courts by adjudicating a particular case or controversy.

B. Respondents contend that the *lower* courts have rejected similar claims. Br. in Opp. 13-14. That is no reason to deny review. That lower courts have effectively read *Klein* out of the U.S. Reports only underscores the need for review.

This Court regularly grants review in separation-of-powers cases even absent a circuit conflict. Pet. 23 (collecting cases). Respondents do not contend otherwise. Nor do they dispute the importance of the constitutional questions. *Id.* at 22-23. Finally, they do not deny Congress's track record of testing separation-of-powers limits in terrorism suits against foreign sovereigns. *Id.* at 23-25. The importance of those issues warrants review regardless of what lower courts have decided.

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[1] Respondents invoke *Pope* v. *United States*, 323 U.S. 1, 11 (1944), for the proposition that a statute does not violate *Klein* even if it renders a party's claim "'uncontested or incontestable.'" Br. in Opp. 21. But *Pope* rested on Congress's plenary authority over payment of claims against the government. 323 U.S. at 9-10; see Pet. 31-32. No such authority is at issue here.

II. This Case Squarely Presents The Questions On Which Bank Markazi Seeks Review

Respondents also err in claiming that this case is a poor vehicle. This case squarely presents the issues for review.

A. Respondents contend that this case does not involve Congress's authority to dictate the outcome of a case subject only to findings on collateral uncontested issues, because the *district court* thought that Congress left "'plenty for [it] to adjudicate.'" Br. in Opp. 20-22 (quoting Pet. App. 115a). But that assertion is irrelevant. This Court reviews the court of appeals' judgment, not the district court's. And the court of appeals expressly held that "Congress may 'chang[e] the law applicable to pending cases,' *even when the result under the revised law is clear.*" Pet. App. 8a (emphasis added). The court acknowledged Bank Markazi's argument that § 8772 "effectively compels only one possible outcome, as Iran's beneficial interest in the assets had been established by the time Congress enacted § 8772." *Id.* at 10a. But the court deemed that argument irrelevant, holding it "foreclosed by * * * *Robertson*, as the statute there was specifically enacted to resolve two pending cases." *Ibid.* Indeed, the court thought "it would be unusual for there to be more than one likely outcome when Congress changes the law for a pending case with a developed factual record." *Ibid.*

The court of appeals thus did not base its holding on the notion that § 8772 left "plenty" for the courts to adjudicate. It assumed that Bank Markazi's description of the statute's effect was correct and held that, even so, the statute was constitutional. Respondents are correct that, "[w]hile the court of appeals did not dispute [Bank Markazi's] premise, neither did it adopt it." Br. in Opp. 21.

But that is precisely the point: Because the court of appeals "did not dispute" that the required statutory findings were makeweights, its decision stands for the proposition that Congress can change the law governing a case *even in those circumstances*. If this Court grants review and ultimately disagrees with that proposition, it will reverse the Second Circuit's decision and remand the case. The court of appeals' holding is thus squarely before the Court.

In any event, the district court's claim that §8772 left "plenty for [it] to adjudicate" is flatly wrong. The court claimed that it "could have found that defendants raised a triable issue as to whether the Blocked Assets were owned by Iran, or that Clearstream and/or UBAE have some form of beneficial or equitable interest." Pet. App. 115a. But there was never any dispute that Bank Markazi had a *beneficial interest* in the assets, which is all the statute requires. Pet. 20. Moreover, the court found that UBAE had disclaimed any interest, and that Clearstream lacked any interest as a matter of law. Pet. App. 111a-112a. Indeed, the statute expressly excludes a "custodial interest of a foreign securities intermediary * * * that holds the assets abroad for the benefit of Iran." 22 U.S.C. §8772(a)(2)(A). The assertion that the statute left "plenty" to adjudicate defies both the statute and the district court's own opinion.

B. Respondents assert that Bank Markazi did not squarely argue below that Congress cannot change the law solely for purposes of one case. Br. in Opp. 22-23. Not so. Bank Markazi expressly argued in its opening brief that §8772 violates the separation of powers by singling out this one case for disfavored treatment. "Section 8772," it explained, "requires that 'the financial assets that are identified in and the subject of proceedings in

the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518' 'shall be subject to execution' by Plaintiffs in this action." C.A. Br. 50 (emphasis omitted). "Congress's overt attempt in §8772 to determine the outcome of this case," Bank Markazi urged, "plainly 'usurp[s] the adjudicative function assigned to the federal courts under Article III.'" *Ibid.* Bank Markazi made the same point in reply, specifically quoting the passage from *Robertson* reserving this issue. See C.A. Reply 19 n.8 ("The *Robertson* Court expressly declined on procedural grounds to address whether 'a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue' in a particular case.").

That was more than sufficient to preserve the issue. Bank Markazi made its objection clear in its opening brief. That it waited until reply to cite the specific passage from *Robertson* describing the issue as unresolved hardly constitutes a forfeiture. Besides, "'[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee* v. *Escondido*, 503 U.S. 519, 534 (1992)). Here, the separation-of-powers claim is clearly presented. Whether Congress violated separation of powers by dictating the result in a single pending case or by changing the law in a single pending case to ensure that one party would win are at most different arguments supporting that same claim.

C. Respondents also assert that this case is a poor vehicle because it involves sovereign immunity, which the

political branches have discretion to withhold in individual cases. Br. in Opp. 23-25. But § 8772 does not merely strip the New York assets of immunity. It also abrogates *substantive* state property law by allowing respondents to seize the New York assets as if they were Bank Markazi's property.

Under U.C.C. Article 8, the New York assets were *not* Bank Markazi's property and thus were not available to satisfy Bank Markazi's debts (let alone Iran's). Bank Markazi's only property was the assets it held in Europe—assets that were beyond the district court's territorial authority to attach. Pet. 5-8. Section 8772 superseded those state-law principles by allowing respondents to seize assets "equal in value to a financial asset of Iran * * * that [a] foreign securities intermediary or a related intermediary holds abroad." 22 U.S.C. § 8772(a)(1)(C). The statute expressly "preempt[ed] any inconsistent provision of State law." *Id.* § 8772(a)(1).

Section 8772 thus rewrote *state property law*. That the statute *also* abrogated settled immunity principles may be an aggravating factor. But respondents are wrong to claim that only immunity is at issue.

D. Piling on one final (but equally meritless) vehicle issue, respondents claim that, even if § 8772 is unconstitutional, the assets are attachable under TRIA. Br. in Opp. 25-26. But the Second Circuit expressly declined to reach that issue. Pet. App. 5a. The remote possibility that the court of appeals might eventually decide the case on different grounds on remand does not make this case a bad vehicle for this Court to address the issue the court of appeals actually decided: the constitutionality of § 8772. Indeed, § 8772's central defect is that it foreclosed consideration of those general legal principles by dictating the outcome of the case.

In any event, TRIA does not apply here. That statute applies only to "*assets of* th[e] terrorist party." 28 U.S.C. §1610 note §201(a) (emphasis added). It thus requires *ownership*. See *Heiser* v. *Islamic Republic of Iran*, 735 F.3d 934, 941 (D.C. Cir. 2013) ("[P]laintiffs could not attach the contested accounts under [TRIA] without an Iranian *ownership interest* in the accounts * * * ." (emphasis added)); cf. *Calderon-Cardona* v. *Bank of N.Y. Mellon*, 770 F.3d 993, 1000-1002 (2d Cir. 2014) (same under 28 U.S.C. §1610(g)). Under U.C.C. Article 8, Bank Markazi does not *own* the assets that Clearstream holds at Citibank in New York; it merely has a beneficial interest in them. Pet. 5-8. Under TRIA, that is not enough.

III. The Case's Foreign Relations Impact Underscores The Need For Review

Respondents barely acknowledge this case's serious international ramifications. They do not even address its impact on the Nation's reputation as a safe custodian for central bank reserves. Pet. 29-30. Nor do they mention the potential for retaliatory legislation by other governments. Pet. 30-31. Those impacts alone underscore the case's importance.

Respondents briefly mention the Treaty of Amity. Br. in Opp. 28. But even there, they offer no substantive response. They dismiss Bank Markazi's analysis as "ironic," *ibid.*, but nowhere defend the Second Circuit's rationale. Nor could they: A statute that singles out an Iranian entity's interests for special, disfavored treatment—precisely because the entity is Iranian—self-evidently violates Article IV.1's prohibition on discriminatory measures. Pet. 25-26. And respondents do not deny that such Treaty breaches expose the United States to claims before international tribunals. *Id.* at 27.

The decision below also thwarts the President's control over foreign affairs. The President reiterated that point in his 2015 State of the Union address: "Our diplomacy is at work with respect to Iran, * * * [b]ut *new sanctions * * * will all but guarantee that diplomacy fails* * * *." 2015 Daily Comp. Pres. Doc. 36, at 7 (Jan. 20, 2015) (emphasis added). Ad hoc legislation transferring nearly $2 billion of assets to Iran's judgment creditors, without regard to settled legal principles, will undoubtedly complicate those diplomatic efforts. It will also undercut international confidence in one of this Nation's greatest assets: governance through the rule of law administered not by the legislature but by an impartial judiciary.

Respondents assert that the President implicitly endorsed § 8772 by not vetoing the statute and by blocking the assets. Br. in Opp. 27. But § 8772 was merely one provision in a much larger bill. See Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214 (Aug. 10, 2012). "[T]hat [the President] signed [an] Act does not mean that he necessarily approved of its every detail. Political realities often guide a President to a decision not to veto." *Nixon* v. *Adm'r of Gen. Servs.*, 433 U.S. 425, 491 (1977) (Blackmun, J., concurring in part). The blocking order is even less relevant. The President issued that order *before § 8772 was enacted.* Executive Order No. 13,599, 77 Fed. Reg. 6659, 6659 (Feb. 5, 2012).

If the Court has any doubt on the Executive Branch's position, it should call for the views of the Solicitor General. While the Executive Branch has a duty to defend statutes where possible, Br. in Opp. 27-28 n.11, that does not preclude it from addressing the *importance* of the issues or the desirability of review. Given the substantial

international ramifications at stake, the Court would benefit from the Executive Branch's views.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 14-770

In the Supreme Court of the United States

BANK MARKAZI, AKA THE CENTRAL BANK OF IRAN,
PETITIONER

v.

DEBORAH PETERSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. 8701 *et seq.*, identifies certain "financial assets" in which the Central Bank of Iran has a security entitlement and that were the subject of post-judgment enforcement proceedings in the United States District Court for the Southern District of New York at the time the provision was enacted. 22 U.S.C. 8772(b). The statute makes those assets "subject to execution or attachment in aid of execution in order to satisfy" certain terrorism-related judgments against the Islamic State of Iran, provided that the assets are (1) "held in the United States for a foreign securities intermediary doing business in the United States," (2) blocked assets, and (3) "equal in value to a financial asset" held abroad by the financial securities intermediary on behalf of the Central Bank of Iran. 22 U.S.C. 8772(a)(1). The question presented is:

Whether 22 U.S.C. 8772 violates the separation of powers.

TABLE OF CONTENTS

Page

Statement 1
Discussion 10
I. The court of appeals' decision is correct 11
A. Section 8772 is constitutional because it amended the governing law applicable to this case rather than directing a particular outcome 11
B. Petitioner's contrary arguments lack merit 16
II. This Court's review is not warranted 20
A. The decision below does not conflict with decisions of other courts of appeals 20
B. Any international ramifications of the court of appeals' decision do not warrant this Court's review 21
Conclusion 24

TABLE OF AUTHORITIES

Cases:

Alfred Dunhill of London, Inc. v. *Republic of Cuba*, 425 U.S 682 (1976) 20
American Ins. Ass'n v. *Garamendi*, 539 U.S. 396 (2003) 19
Biodiversity Assocs. v. *Cables*, 357 F.3d 1152 (10th Cir.), cert. denied, 543 U.S. 817 (2004) 20
Dames & Moore v. *Regan*, 453 U.S. 654 (1981) 19
First Nat'l City Bank v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) 4
Janko v. *Gates*, 741 F.3d 136 (D.C. Cir. 2014), cert. denied, 135 S. Ct. 1530 (2015) 20
Lindh v. *Murphy*, 96 F.3d 856 (7th Cir. 1996), rev'd on other grounds, 521 U.S. 320 (1997) 20
Medellín v. *Texas*, 552 U.S. 491 (2008) 19

Cases—Continued: Page

National Coal. to Save Our Mall v. *Norton*, 269 F.3d 1092 (D.C. Cir. 2001), cert. denied, 537 U.S. 813 (2002) 18, 20
Pennsylvania v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856) 17, 18
Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) 12, 15, 17
Republic of Austria v. *Altmann*, 541 U.S. 677 (2004) 18
Robertson v. *Seattle Audubon Soc'y*, 503 U.S. 429 (1992) ..... *passim*
Roeder v. *Islamic Repub. of Iran*, 333 F.3d 228, 235 (D.C. Cir 2003), cert. denied, 542 U.S. 915 (2004) 18
Samantar v. *Yousuf*, 560 U.S. 305 (2010) 2
United States v. *Klein*, 80 U.S. (13 Wall.) 128 (1872) ..... *passim*
United States v. *Padelford*, 76 U.S. (9 Wall.) 531 (1870) 11
Zivotofsky v. *Kerry*, 135 S. Ct. 2076 (2015) 23

Constitution, treaties, statutes, regulations and rules:

U.S. Const. Art. III 16
Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899, 1957 WL 52887 ..... 10, 22
art. II.1 21
art. II.2(a) 21
art. II.4 21
art. III.1 ..... 21, 22
art. IV.1 ..... 10, 21
art. V.1 10
art. XI.1 23

Treaties, statutes, regulations and rules—Continued: Page
art. XI.4 ..... 22, 23
Abandoned Property Collection Act, ch. 120, 12 Stat. 820:
§ 3, 12 Stat. 820 11
Act of July 12, 1870, ch. 251, 16 Stat. 235 12
Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1441(d), 1602 *et seq.* 1
28 U.S.C. 1604 1
28 U.S.C. 1605-1607 1
28 U.S.C. 1605(a)(2) 2
28 U.S.C. 1605(a)(3) 2
28 U.S.C. 1605(a)(7)(2000) 2
28 U.S.C. 1605(b) 2
28 U.S.C. 1605A 2
28 U.S.C. 1609 2
28 U.S.C. 1609-1611 2
28 U.S.C. 1610 2
28 U.S.C. 1610(a)(7) 2
28 U.S.C. 1610(b)(3) 2
28 U.S.C. 1610(f)(1)(A) 4
28 U.S.C. 1610(g)(1) 4, 5
28 U.S.C. 1610 note 4
28 U.S.C. 1611(a) 3
28 U.S.C. 1611(b)(1) 3, 14, 15
International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.* 3, 4
Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. 8701 *et seq.* 5
22 U.S.C. 8772 ..... *passim*
22 U.S.C. 8772(a) 15
22 U.S.C. 8772(a)(1) 9, 14, 15

Statutes, regulations and rules—Continued: Page

22 U.S.C. 8772(a)(1)(A) 16
22 U.S.C. 8772(a)(1)(B) 16
22 U.S.C. 8772(a)(1)(C) 15, 16
22 U.S.C. 8772(a)(2) 9, 15
22 U.S.C. 8772(a)(2)(A) 14
22 U.S.C. 8772(b) 5
National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 *et seq.*:
§ 1083(a), 122 Stat. 338-341 5
§ 1083(b)(1)(A)(iii), 122 Stat. 341 5
§ 1083(b)(3)(D), 122 Stat. 341-342 5
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 13
Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2337 4
§ 201(a), 116 Stat. 2337 ..... 4, 8
§ 201(d)(4), 116 Stat. 2340 4
Trading with the Enemy Act, 50 U.S.C. App. 5 ..... 3, 4
28 U.S.C. 1963 5
N.Y. U.C.C. Law (McKinney 2002):
§ 8-112 8
§ 8-112(c) 6, 14
The Monetary and Banking Law of July 9, 1972 (Iran), arts. 10-11, http://www.cbi.ir/page/2234.aspx 22
Exec. Order No. 13,224, § 1, 3 C.F.R. 786 (2002) 3
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Fed. R. Civ. P. 69(a)(1) 6, 13

Miscellaneous: Page

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Memorandum on Blocked Property of Terrorist-List States, 34 Weekly Comp. Pres. Doc. 2088 (Oct. 21, 1998) 4

In the Supreme Court of the United States

No. 14-770

BANK MARKAZI, AKA THE CENTRAL BANK OF IRAN, PETITIONER

v.

DEBORAH PETERSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, defines the scope of immunity enjoyed by a foreign state from suit. The statute provides that a "foreign state" and its agencies and instrumentalities are "immune from the jurisdiction" of federal and state courts except as provided by certain international agreements and by the exceptions to immunity set forth in Sections 1605-1607. 28 U.S.C. 1604; see 28 U.S.C. 1605-1607. The statute's exceptions largely "codify the

restrictive theory of sovereign immunity," under which a foreign state is immune from suits involving its sovereign or public acts but not from suits arising from its commercial activities. *Samantar* v. *Yousuf*, 560 U.S. 305, 313 (2010); see, *e.g.*, 28 U.S.C. 1605(a)(2), (3), and (b).

One exception to foreign sovereign immunity, known as the "terrorism exception," applies to suits seeking money damages for "personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking," if the foreign state was designated "as a state sponsor of terrorism" by the Secretary of State "at the time the act occurred" or later "as a result of such act." 28 U.S.C. 1605(a)(7) (2000); see 28 U.S.C. 1605A (revising and recodifying the terrorism exception).

b. The FSIA also governs attachment and execution against the property of foreign states and their agencies and instrumentalities. 28 U.S.C. 1609-1611. Section 1609 establishes a general rule that "the property in the United States of a foreign state" is "immune from attachment arrest and execution," 28 U.S.C. 1609, with exceptions set out in Section 1610. As relevant here, Section 1610 provides that when the "judgment relates to a claim for which the foreign state is not immune under" the terrorism exception to jurisdictional immunity (28 U.S.C. 1605A), the judgment creditor may execute against the property of a foreign state if it is used for commercial activity, 28 U.S.C. 1610(a)(7), and the property of a foreign-state agency or instrumentality whether or not it is used for commercial activity, 28 U.S.C. 1610(b)(3).

The FSIA also identifies specific types of property that are immune from execution "[n]otwithstanding

the provisions of [S]ection 1610." 28 U.S.C. 1611(a). Under Section 1611(b)(1), the property "of a foreign central bank or monetary authority held for its own account" is immune from attachment and execution unless the bank "or its parent foreign government" has explicitly waived its immunity. 28 U.S.C. 1611(b)(1).

c. Victims of state-sponsored terrorism who have obtained judgments against foreign states under the FSIA's terrorism exception have often faced practical and legal difficulties in enforcing their judgments. Congress has enacted a number of statutes designed in part to facilitate enforcement of those judgments.

Enforcement of terrorism-related judgments takes place against the backdrop of the sanctions programs to which the property in the United States of state sponsors of terrorism typically is subject. See, *e.g.*, International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*; Trading with the Enemy Act (TWEA), 50 U.S.C. App. 5. Those programs authorize the President to "block" particular assets in the United States. Blocking broadly prohibits transactions concerning the subject property in the absence of Executive Branch authorization. See, *e.g.*, Exec. Order No. 13,224, § 1, 3 C.F.R. 786 (2002). In 2012, for instance, the President issued an Executive Order blocking all assets of Iran and its agencies and instrumentalities "that are in the United States," with some exceptions that are not relevant to this case. Exec. Order No. 13,599, 3 C.F.R. 215 (2013).

Congress has enacted several statutes designed to facilitate execution specifically against property that is subject to a blocking regime to satisfy terrorism-related judgments. In 1998, Congress authorized

execution against blocked foreign-state property on any judgment obtained under the terrorism exception "[n]otwithstanding any other provision of law, includeing" IEEPA, TWEA, and other sanctions programs. 28 U.S.C. 1610(f)(1)(A). Congress authorized the President to "waive" that authorization "in the interest of national security," 28 U.S.C. 1610 note, and the President exercised that authority. Memorandum on Blocked Property of Terrorist-List States, 34 Weekly Comp. Pres. Doc. 2088 (Oct. 21, 1998).

Next, in Section 201 of the Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107-297, 116 Stat. 2337, Congress authorized plaintiffs with judgments obtained under the terrorism exception to execute against "the blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)." § 201(a), 116 Stat. 2337; § 201(d)(4), 116 Stat. 2340. TRIA thus expanded the universe of property that can be attached to satisfy a terrorism-related judgment by providing that judgment creditors may attach the blocked assets of a juridically separate agency or instrumentality in order to satisfy a judgment against the foreign state itself. See *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-628 (1983) (ordinarily an instrumentality's assets may not be used to satisfy a claim against the state).

In 2008, Congress amended the FSIA to expand plaintiffs' ability to enforce a terrorism-related judgment against assets of a foreign state. As amended, Section 1610(g)(1) permits plaintiffs to attach the property of a foreign state agency or instrumentality to satisfy the judgment against the foreign state, regardless of whether the agency or instrumentality is juri-

dically separate from the state and whether the assets are blocked. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(a), (b)(1)(A)(iii), and (b)(3)(D), 122 Stat. 338-341; 28 U.S.C. 1610(g)(1).

In 2012, while this case was pending, Congress again rendered additional blocked assets subject to attachment by enacting the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. 8701 *et seq.* That statute provides that certain blocked assets—specifically, "the financial assets that are identified in and the subject of proceedings" in this case—are subject to attachment to satisfy judgments against Iran for terrorist acts if the court makes certain factual findings. 22 U.S.C. 8772(b); see pp. 7-9, *infra*.

2. a. Respondents are more than 1000 victims of terrorist attacks sponsored by Iran or the representatives and surviving family members of such victims. Pet. App. 52a-53a. Respondents are judgment creditors of Iran, having obtained "billions of dollars in judgments against Iran" under the FSIA's terrorism exception to foreign state immunity. *Id.* at 53a. Respondents registered their judgments in the United States District Court for the Southern District of New York, where they sought to execute their judgments on any property of Iran they could identify within the jurisdiction. *Id.* at 53a-54a; see 28 U.S.C. 1963.

Respondents proceeded against approximately $1.75 billion in bonds (the bond assets) held in a New York account at Citibank, N.A., on behalf of petitioner. Pet. 7; Pet. App. 2a. Petitioner "is the Central Bank of Iran, which is wholly owned by the Iranian government." *Ibid.* Petitioner has a "beneficial interest" in

the bond assets, which are held by Citibank, N.A., in an omnibus account for Clearstream Banking, S.A., a financial intermediary. *Ibid.* Clearstream, in turn, maintains the Citibank account in part for Banca UBAE S.p.A., an Italian bank, whose customer is in turn petitioner. *Ibid.*; see Pet. 7-8, 20.

In 2008, when some respondents learned of the existence of the bond assets, they obtained from the district court a writ of execution, which restrained the assets. Pet. App. 62a. At the outset of the litigation, the bonds had not yet matured, so the assets took the form of security entitlements.[1] Pet. 7-8 & n.1. Clearstream argued that respondents could not execute against the bond assets under New York state law. Pet. App. 62a. Ordinarily, in the absence of a governing federal statute, "[t]he procedure on execution * * * must accord with the procedure of the state where the court is located." Fed. R. Civ. P. 69(a)(1). Clearstream argued that the bond assets were not subject to execution under N.Y. U.C.C. Law § 8-112(c) (McKinney 2002), which provides that "[t]he interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon the securities intermediary with whom the debtor's securities account is maintained." *Ibid.* Because Clearstream did not maintain an account in petitioner's name, the court agreed with Clearstream that the bond assets could not be attached under Section 8-112(c). Pet. App. 126a-127a.

In 2010, respondents filed amended complaints against petitioner, Clearstream, Citibank, and UBAE, seeking turnover of the assets. Pet. App. 3a; see *id.* at

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[1] During the proceedings, the bonds matured "so that Citibank then held the cash proceeds." Pet. 8 n.1.

62a-63a. Citibank filed an interpleader action, and the district court consolidated the various proceedings concerning the bond assets. *Id.* at 15a.

While the consolidated proceedings were pending, the President issued Executive Order 13,599, which blocked "[a]ll property and interests in property of the Government of Iran, including the Central Bank of Iran, that are in the United States." Exec. Order. 13,599, *supra*. The Executive Order explained that the blocking action was appropriate in light of "the deceptive practices of [petitioner] * * * to conceal transactions of sanctioned parties."[2] *Ibid.* The bond assets were among those blocked by the Executive Order. Once the bond assets were blocked, respondents sought summary judgment on their claim for execution under TRIA, which permits execution against "the blocked assets of any agency or instru-

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[2] Upon learning that Clearstream maintained securities on behalf of petitioner that were custodized and located in the United States, the Treasury Department's Office of Foreign Assets Control initiated an investigation into Clearstream for potentially exporting financial services from the United States to Iran in violation of the Iranian Transactions and Sanctions Regulations (ITSR), 31 C.F.R. Pt. 560. See *Clearstream Banking, S.A. Settles Potential Liability for Apparent Violations of Iranian Sanctions* 1 (Jan. 23, 2014), http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20140123_clearstream.pdf. As a result of the "omnibus nature of Clearstream's account" and the chain of intermediaries through which petitioner controlled the assets, petitioner's "beneficial ownership interest in the * * * securities was not transparent" to the U.S. financial institutions and/or custodians that maintained the securities for Clearstream, and Clearstream was able to "export[] custody and related services from the United States to [petitioner] in apparent violation of the ITSR." *Ibid.* Clearstream paid approximately $152 million to settle its "potential civil liability." *Ibid.*

mentality of th[e] terrorist party" to satisfy a judgment under the FSIA's terrorism exception. TRIA § 201(a), 116 Stat. 2337; Pet. App. 3a. Petitioner argued (Pet. 9) that the bond assets were not subject to execution under TRIA because they were not petitioner's property under Section 8-112 of the New York U.C.C., and thus were not assets "of" an agency of a terrorist party under TRIA.

While that motion was pending, Congress enacted Section 8772 of the Iran Threat Reduction and Syria Human Rights Act of 2012. 22 U.S.C. 8772; Pet. App. 3a-4a. Section 8772(a)(1) provides that,

> notwithstanding any other provision of law * * * , and preempting any inconsistent provision of State law, a financial asset that is—
>
> (A) held in the United States for a foreign securities intermediary doing business in the United States;
>
> (B) a blocked asset (whether or not subsequently unblocked) that is property described in subsection (b); and
>
> (C) equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran or any agency or instrumentality of that Government, that such foreign securities intermediary or a related intermediary holds abroad,
>
> shall be subject to execution or attachment in aid of execution in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran [in terrorism-related cases].

22 U.S.C. 8772(a)(1). The statute requires the court, before permitting execution against such assets, to "determine whether Iran holds equitable title to, or the beneficial interest in, the assets," and also "that no other person possesses a constitutionally protected interest in the assets." 22 U.S.C. 8772(a)(2); see *ibid.* (authorizing execution only to the extent of Iran's interest in the property).

b. The district court granted partial summary judgment to respondents, holding that the bond assets were subject to turnover under Section 8772 and TRIA. Pet. App. 52a-124a. As required by Section 8772, the district court determined that "[o]n this record and as a matter of law," only petitioner had a beneficial interest in the bond assets. *Id.* at 111a-112a.

The district court rejected petitioner's contention that Section 8772 violated the separation-of-powers principles explicated in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), because it "dictated specific factual findings in connection with a specific litigation." Pet. App. 114a-115a. The court explained that Section 8772 established new legal standards without usurping the court's role of applying those standards to the facts at hand. *Id.* at 115a.

The district court also concluded that the bond assets were "assets of [a] terrorist party" subject to attachment under TRIA because petitioner had conceded that it was the sole beneficial owner of the assets. Pet. App. 97a-99a.

3. The court of appeals affirmed. Pet. App. 1a-12a. On appeal, petitioner "concede[d] that the statutory elements for turnover of the assets under [Section] 8772 have been satisfied." *Id.* at 2a. Petitioner argued, however, that Section 8772 conflicts with the

Treaty of Amity between the United States and Iran, see Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899, 1957 WL 52887 (Treaty of Amity), and violates the separation of powers. *Id.* at 2a.

The court of appeals first held that Section 8772 did not conflict with the Treaty of Amity's provisions requiring fair and equitable treatment of "nationals and companies" because Section 8772 is not discriminatory. Pet. App. 7a (citing Treaty of Amity arts. IV.1, V.1).

The court of appeals next rejected petitioner's separation-of-powers argument. Pet. App. 7a-10a. The court explained that, under *Klein*, *supra*, Congress usurps the courts' adjudicative role if it directs the outcome of a case under existing law. Pet. App. 8a. But, the court continued, Congress may constitutionally alter the law governing a pending case, even if doing so changes the outcome of the case. *Id.* at 8a-9a (discussing *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429 (1992)). The court concluded that Section 8772 "retroactively changes the law applicable in this case, a permissible exercise of legislative authority." *Id.* at 8a.

Having concluded that Section 8772 authorized turnover of the bond assets, the court of appeals declined to address petitioner's contention that the requirements for attachment under TRIA were not satisfied. Pet. App. 1a-2a.

DISCUSSION

Petitioner contends (Pet. 15-22) that Section 8772 violates the separation-of-powers principles set forth in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), because it dictates the outcome of a particular case.

The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Petitioner is also incorrect in contending (Pet. 25-31) that the court of appeals' decision has important international ramifications justifying review. The petition for a writ of certiorari should be denied.

I. THE COURT OF APPEALS' DECISION IS CORRECT

A. Section 8772 Is Constitutional Because It Amended The Governing Law Applicable To This Case Rather Than Directing A Particular Outcome

In *Klein* and subsequent decisions, this Court held that while Congress may alter the law governing a pending case, it may not usurp the Judiciary's role by directing a particular result in a pending case under existing law. The court of appeals correctly held that Section 8772 permissibly altered the law applicable to this case by changing the standards governing execution against the assets at issue and leaving application of those standards for judicial determination.

1. *Klein* arose out of efforts to recover property seized by Union military authorities during the Civil War. Under the Abandoned Property Collection Act, ch. 120, 12 Stat. 820, a person whose property had been seized by the military could recover its value in the Court of Claims upon a showing that, *inter alia*, the claimant "ha[d] never given any aid or comfort to the present rebellion." § 3, 12 Stat. 820. In *United States* v. *Padelford*, 76 U.S. (9 Wall.) 531, 542-543 (1870), this Court held that receipt of a Presidential pardon was conclusive proof of loyalty and entitled the recipient to return of his property. In response, Congress enacted a statute providing, *inter alia*, that

acceptance of a pardon without written protest or disclaimer must be treated by the courts as conclusive evidence of the claimant's disloyalty; and that the Court of Claims and this Court were required to dismiss for want of jurisdiction any pending claims for recovery of property based on a Presidential pardon. Act of July 12, 1870, ch. 251, 16 Stat. 235; see *Klein*, 80 U.S. (13 Wall.) at 132-134, 143-144.

This Court held that the legislation impermissibly "impair[ed] the effect of a pardon, and thus infring[ed] the constitutional power of the Executive." *Klein*, 80 U.S. (13 Wall.) at 147. In addition, the Court concluded that "Congress has inadvertently passed the limit which separates the legislative from the judicial power." *Ibid.* The legislation at issue "prescribe[d] a rule for the decision of a cause in a particular way" and could not be sustained "without allowing one party to the controversy to decide it in its own favor." *Id.* at 146.

The Court has elaborated on the meaning of *Klein* in subsequent decisions. In *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992), the Court explained that *Klein* does not apply when Congress "amend[s] applicable law," *id.* at 441, by "replac[ing] the legal standards underlying" pending litigation, as opposed to directing the disposition of cases under existing law, *id.* at 437; see *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (Congress may "set[] out" new "substantive legal standards for the Judiciary to apply" consistent with *Klein.*). In *Robertson*, the Court upheld legislation that Congress had enacted "[i]n response to * * * ongoing litigation" challenging certain government timber-harvesting plans as inconsistent with the National Environmental Poli-

cy Act of 1969, 42 U.S.C. 4321 *et seq.*, and other environmental statutes. 503 U.S. at 433. The newly enacted legislation set forth certain substantive requirements that would apply to harvesting on the lands at issue in the litigation, and provided that compliance with those requirements "is adequate consideration for the purpose of meeting the statutory requirements that are the basis for" the pending litigation. *Id.* at 437 (citation omitted). This Court held that the legislation permissibly "replaced the legal standards underlying the two original challenges with" new standards, thus changing the law governing the case. *Id.* at 437, 438. The legislation did not unconstitutionally direct "findings or results under old law," the Court explained, and it "did not instruct the courts whether any particular timber sales would violate" the new standards or "direct any particular findings of fact or applications of law." *Id.* at 438-439.

2. The court of appeals correctly held that Section 8772 is not invalid under *Klein* because it "changes the law applicable to this case" by establishing new substantive standards for the courts to apply to the facts before them. Pet. App. 9a.

a. Section 8772 changes the applicable law in at least two respects: it preempts otherwise applicable state law that would prevent execution against a debtor's security entitlement to property and substitutes a different federal rule, and it eliminates any immunity from execution that petitioner might otherwise enjoy as the central bank of Iran.

First, as petitioner acknowledges (Pet. 10, 14), Section 8772 displaces state law that would ordinarily govern execution on a judgment obtained in federal court. See p. 6, *supra*; Fed. R. Civ. P. 69(a)(1) ("[t]he

procedure on execution * * * must accord with the procedure of the state where the court is located"). Under that state law, a creditor's interest in a debtor's security entitlement may be reached "only by legal process upon the securities intermediary with whom the debtor's securities account is maintained." N.Y. U.C.C. Law § 8-112(c) (McKinney 2002); see Pet. 5. Relying on that law, petitioner argued in the district court "that the security entitlements Citibank held for Clearstream were not [petitioner's] property under U.C.C. Article 8" and so were not subject to attachment. Pet. 9.

Section 8772, however, makes subject to attachment any financial asset in which Iran holds a beneficial interest and which is "held in the United States for a foreign securities intermediary doing business in the United States," if the asset is blocked and "equal in value to a financial asset of * * * the central bank [of Iran] * * * that such foreign securities intermediary or a related intermediary holds abroad." 22 U.S.C. 8772(a)(1), (a)(2)(A). Because Section 8772 expressly "preempt[s] any inconsistent provision of State law," *ibid.*, it replaces Section 8-112(c) of the New York U.C.C. as the "substantive law" governing the execution proceedings below. Pet. 5; see *Robertson*, 503 U.S. at 437 ("replac[ing]" the governing legal standards with new standards is consistent with *Klein*).

Second, Section 8772 amended existing law by superseding any immunity from execution Section 1611(b)(1) of the FSIA would have conferred on petitioner's assets by virtue of petitioner's status as the central bank of Iran. Section 1611(b)(1) provides that the property "of a foreign central bank or monetary

authority held for its own account" is generally immune from attachment and execution. 28 U.S.C. 1611(b)(1). In the district court, petitioner argued that even if the bond assets were deemed to be its property for purposes of execution, the assets would nevertheless be immune from attachment under Section 1611(b)(1). See Pet. 9; Pet. App. 102a-104a. Section 8772, however, expressly subjects to execution "asset[s] of the central bank or monetary authority of the Government of Iran." 22 U.S.C. 8772(a)(1)(C). It does so "notwithstanding any other provision of law, including any provision of law relating to sovereign immunity." 22 U.S.C. 8772(a)(1). As the district court correctly recognized, Section 8772 "sweeps away the FSIA provision setting forth a central bank immunity." Pet. App. 73a.

b. Section 8772 also does not require any particular findings or result. See *Plaut*, 514 U.S. at 218. The statute does not direct the courts to turn specified assets over to respondents. Cf. *Robertson*, 503 U.S. at 438-439. Instead, the statute provides that "the court shall determine" whether the financial assets at issue in this case meet the new standards Congress enacted. 22 U.S.C. 8772(a)(2).

Before authorizing execution, the district court made the findings required by Section 8772(a). In particular, as required by Section 8772(a)(2), the court determined that petitioner "holds equitable title to, or the beneficial interest in," the assets, and that no other person possesses an interest in the assets. 22 U.S.C. 8772(a)(2); see Pet. App. 109a (finding that "[n]o rational juror could find that any person or entity—other than [petitioner]—has a constitutional, beneficial or equitable interest" in the bond assets).

In addition, as the district court's opinions reflected, it was uncontested that respondents had satisfied Section 8772's other elements: (1) Clearstream is a foreign securities intermediary doing business in New York, 22 U.S.C. 8772(a)(1)(A); Pet. App. 57a, (2) the bond assets are blocked, 22 U.S.C. 8772(a)(1)(B); Pet. App. 63a-64a, (3) the assets at issue are held by Citibank for Clearstream, 22 U.S.C. 8772(a)(1)(A); Pet. App. 56a, 58a, and (4) the assets at issue are equivalent in value to assets held abroad by Clearstream and UBAE on behalf of petitioner, 22 U.S.C. 8772(a)(1)(C); Pet. App. 56a, 58a-60a. See generally Pet. App. 5a, 111a-113a.

B. Petitioner's Contrary Arguments Lack Merit

Petitioner contends (Pet. 19-22) that even if Section 8772 altered the governing law applicable to this case, the statute is nonetheless unconstitutional for two reasons: first, the required judicial findings concerned "collateral uncontested issues" and therefore did not reflect a "meaningful reservation of judicial authority," Pet. 20-21, and second, the statute is directed to a single case, Pet. 22. Petitioner is incorrect.

1. Petitioner argues (Pet. 19-22) that Section 8772 effectively directed the outcome in this case because the judicial findings contemplated by the provision were never in "serious question." Pet. 20. But this Court has never suggested that whether there is a "serious question" about how a statute applies to the facts before a court is the test for determining whether the statute invades the court's Article III functions. *Robertson* held that the legislation at issue in that case—which was enacted in response to pending litigation—was constitutional because it did not "direct any particular findings of fact" or "instruct the courts

whether any particular timber sales would violate" the new standards. 503 U.S. at 438-439. The Court did not examine whether compliance with the new standards presented a "serious question" or would require the court to resolve disputed factual issues. Rather, it viewed the fact that the statute did not "direct" particular findings, without more, as dispositive of the *Klein* question. Accord *Plaut*, 514 U.S. at 218 (It is sufficient that the statute "set[s] out substantive legal standards for the Judiciary to apply.").

2. Petitioner next argues (Pet. 22) that Section 8772 is unconstitutional because it purports to change the applicable law for purposes of a single pending case. As petitioner observes, the Court in *Robertson* declined to address the question whether "even a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases." 503 U.S. at 441. But both *Klein* and an earlier case, *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856) (*Wheeling Bridge*), indicate that legislation designed to alter governing law in a single case does not offend separation-of-powers principles.

In *Wheeling Bridge*, the Court upheld a statute that declared a bridge to be a "lawful structure[]" after the Court had in an earlier case held it to be a nuisance and granted prospective relief. *Id.* at 429. The Court rejected the State's argument that the statute was unconstitutional because it "annul[led] the judgment of the court already rendered," *id.* at 431, explaining that the intervening statute altered the underlying law and made it "plain [that] the [injunctive] decree of the court cannot be enforced." *Id.* at

431-432. *Klein* reaffirmed *Wheeling Bridge*, explaining that the statute at issue in *Wheeling Bridge* was constitutional because it allowed the Court "to apply its ordinary rules to the new circumstances created by the act." *Klein*, 80 U.S. (13 Wall.) at 146-147. *Wheeling Bridge* and *Klein* thus indicate that Congress may change the governing law for one case alone. See *National Coal. to Save Our Mall* v. *Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001) ("In view of * * * *Wheeling Bridge*, we see no reason why the specificity [of a statute] should suddenly become fatal."), cert. denied, 537 U.S. 813 (2002).

In any event, even if there might be contexts in which a change in the law applicable only to one case would raise separation-of-powers concerns, this case would not be an appropriate vehicle to consider such concerns. Section 8772 pertains to the rules governing execution against a foreign state's property in satisfaction of a judgment against the foreign state. Claims against foreign sovereigns have long been uniquely subject to changes in law and other actions by the political Branches, including changes that could affect a single case. In *Republic of Austria* v. *Altmann*, 541 U.S. 677, 689 (2004), this Court explained that a foreign state's immunity is not a constitutional requirement. Immunity determinations were historically made by the Executive on a case-by-case basis, and the courts "deferr[ed] to the decisions of the political branches" on "whether to take jurisdiction" in a particular case. *Id.* at 696 (citation and internal quotation marks omitted); cf. *Roeder* v. *Islamic Repub. of Iran*, 333 F.3d 228, 235 (D.C. Cir. 2003) (discussing statutory amendment that "created an exception, for this case alone, to Iran's sovereign immunity, which

would otherwise have barred the action"), cert. denied, 542 U.S. 915 (2004). In addition, it is well-established that the President and Congress, in the exercise of their foreign-relations authority, may settle or extinguish particular pending claims against a foreign state or its nationals. *Dames & Moore* v. *Regan*, 453 U.S. 654, 679 (1981); *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 415-416 (2003); *Medellín* v. *Texas*, 552 U.S. 491, 531 (2008). Congress has also enacted various blocking statutes that enable the President to block foreign-state assets when doing so is in the interests of the United States. *Dames & Moore*, 453 U.S. at 673; see p. 3, *supra*. Any decision to block particular assets, and to assert extensive control over them through licensing or other measures, could have a dispositive impact on one (or more) pending cases against a foreign state. This case thus involves not only the power of Congress and the President to alter the governing law applicable to pending suits, but in addition the broad powers of the political Branches to regulate with respect to the disposition of the *assets* of a foreign state. Section 8772 represents an exercise of the political Branches' broad powers over foreign relations, national security, and foreign commerce, and *Klein* furnishes no basis for invalidating Congress's judgment that the assets at issue here may properly be made available to pay terrorism judgments against Iran.[3]

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[3] Relatedly, petitioner is incorrect in arguing that this case is a good vehicle for considering *Klein*'s application because it "involves paradigmatic private rights" in an action "at common law for damages." Pet. 32 (citation omitted). A suit against a foreign state does not involve "paradigmatic private rights" because there was no action at common law for damages against foreign states,

II. THIS COURT'S REVIEW IS NOT WARRANTED

A. The Decision Below Does Not Conflict With Decisions Of Other Courts Of Appeals

Petitioner has identified no disagreement among the circuits on the question presented. See Pet. 23 (urging the Court to grant certiorari "even absent a clear circuit conflict"); Pet. Reply Br. 5 (same). The courts of appeals have consistently declined to find statutes unconstitutional on *Klein* grounds. See *Janko* v. *Gates*, 741 F.3d 136, 146 (D.C. Cir. 2014) (*Klein* does not apply to case that was not pending when the statute was enacted.), cert. denied, 135 S. Ct. 1530 (2015); *Biodiversity Assocs.* v. *Cables*, 357 F.3d 1152, 1171 (10th Cir. 2004) (*Klein* did not apply because statute amended applicable law.), cert. denied, 543 U.S. 817 (2004); *National Coal. to Save Our Mall*, 269 F.3d at 1097 (statute changing law with respect to a specific memorial was constitutional); *Lindh* v. *Murphy*, 96 F.3d 856, 872 (7th Cir. 1996) (en banc) (discussing *Klein* rule in rejecting argument that Congress may not provide for deferential habeas review of state convictions), rev'd on other grounds, 521 U.S. 320 (1997). And while, as petitioner argues (Pet. 18), some courts have observed that *Klein* is "difficult * * * to interpret," *Biodiversity Assocs.*, 357 F.3d at 1170, they have concluded, like the decision below, that a statute that amends the law applicable to a pending case presents no problem under *Klein*, see *id.* at 1171. Because Section 8772 clearly

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which historically were absolutely immune from suit. See, *e.g.*, *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 698 (1976).

amends existing law, this case presents no occasion to resolve any confusion about *Klein*'s outer bounds.

B. Any International Ramifications Of The Court Of Appeals' Decision Do Not Warrant This Court's Review

Petitioner argues (Pet. 25-31) that review is warranted because the court of appeals' decision has "important international ramifications." Pet. 25 (capitalization altered). The Second Circuit's decision does not have the consequences petitioner attributes to it.

1. Petitioner argues (Pet. 25-27) that Section 8772 violates Article IV.1 of the Treaty of Amity between the United States and Iran, which requires the parties to "accord fair and equitable treatment" to each other's "nationals and companies." Treaty of Amity art. IV.1. Petitioner also argues in passing (Pet. 26 n.3) that the statute violates Article III.1 of the Treaty of Amity, which requires each state to "recognize[]" the "juridical status" of "[c]ompanies" of the other state. Treaty of Amity art. III.1. Contrary to petitioner's argument, the Treaty is not implicated here because petitioner is not a "national" or "compan[y]" within the meaning of the Treaty.

Petitioner is not a "national" of Iran as that term is used in the Treaty. The context makes clear that the term includes only natural persons. For instance, Article II.2(a) grants a "national[]" the right to travel and reside at a place of the national's choice; Article II.4 grants nationals the right to "humane treatment" when taken "in[to] custody"; and Article II.1 governs the right of nationals to "enter and remain in the territories" of the parties. Those provisions make sense only if they are understood to refer exclusively to natural persons.

Nor is petitioner a "compan[y]" within the meaning of the Treaty. The term "companies" is defined as "corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit." Treaty of Amity art. III.1. That definition—which does not include any reference to government agencies and instrumentalities—is not naturally read to include entities like petitioner. The central bank of Iran is an agency of the state that carries out sovereign functions. See The Monetary and Banking Law of July 9, 1972 (Iran), Arts. 10-11, www.cbi.ir/page/2234.aspx (petitioner is responsible for, among other things, issuing currency, formulating regulations pertaining to foreign exchange transactions, and stabilizing the national currency); Central Bank of the Islamic Republic of Iran, *General Information*, www.cbi.ir/page/General Information.aspx (last visited Aug. 18, 2015); see also Pet. 7 ("Like other central banks, [petitioner] holds foreign currency reserves to carry out monetary policies such as maintaining price stability."). Had the treaty parties intended provisions guaranteeing fair treatment to "companies" to apply as well to governmental agencies executing functions on behalf of the sovereign, they would have expressly so provided.

Other provisions of the Treaty of Amity confirm that the term "companies" does not include entities like petitioner. Article XI.4 refers to "government agencies and instrumentalities" as distinct from "corporations" and "associations." Treaty of Amity art. XI.4. And when the Treaty of Amity refers to entities controlled or owned by the sovereign or to sovereign agencies or instrumentalities, it does so expressly, referring to "enterprises owned or controlled by [the]

Government" or "government agencies and instrumentalities." *Id.* arts. XI.1, XI.4.

2. Petitioner's remaining arguments also lack merit.

Petitioner contends (Pet. 27-29) that Section 8772 "undermines" the President's ability to conduct foreign affairs because it limits his statutory authority to dispose of blocked assets. Petitioner does not argue that Section 8772 unconstitutionally impinges on any exclusive presidential power. Cf. *Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2083-2084 (2015). Instead, petitioner suggests that the President might prefer to dispose of the blocked assets in some way other than that required by Section 8772. Pet. 28-29. Such speculation does not militate in favor of this Court's review of the *Klein* question presented by the petition.

Finally, petitioner argues (Pet. 29-31) that the court of appeals' decision undermines confidence in U.S. financial markets and invites retaliation by foreign governments. But Section 8772 is a narrowly tailored provision that Congress enacted to permit execution on a terrorism judgment against the assets beneficially owned by the central bank of a state sponsor of terrorism—assets that were being held in the United States in violation of U.S. sanctions laws and regulations. See p. 2, *supra*. In the view of the United States, the law-abiding members of the international community should not find such legislation cause for alarm.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

BANK MARKAZI,
THE CENTRAL BANK OF IRAN,

Petitioner,

v.

DEBORAH D. PETERSON, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF FEDERAL COURTS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* 1

STATEMENT 2

ARGUMENT 3

I. Section 8772 violates the principle that Congress may not direct the result in a pending case without amending the underlying law. 4

A. *United States* v. *Klein* is best understood to forbid Congress from directing the result in a pending case without amending the underlying law. 5

B. Precluding Congress from directing results without changing the law serves important separation of powers values. 10

C. Section 8772 violates *Klein*'s principle by directing a result in pending litigation without amending the underlying law. 15

II. Section 8772 invades the province of the courts by purporting to legislate with respect to a single case. 19

A. Congress ordinarily may not legislate with respect to a single case..... 20

B. Section 8772 violates the principle of legislative generality. 25

CONCLUSION 28

TABLE OF AUTHORITIES

Cases

Cruzan by Cruzan v. *Director, Missouri Dept. of Health*, 497 U.S. 261 (1990) 12, 22

Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869) 6

Fletcher v. *Peck*, 10 U.S. (6 Cranch) 87 (1810) 19

INS v. *Chadha*, 462 U.S. 919 (1983) 11, 12, 21

Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) 7

Lucas v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992) 26

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 12

Morrison v. *Olson*, 487 U.S. 654 (1988) 3

National Coalition to Save Our Mall v. *Norton*, 269 F.3d 1092 (D.C. Cir. 2001) 23

Nixon v. *Administrator of General Services*, 433 U.S. 425 (1977) 20

Nollan v. *California Coastal Comm'n*, 483 U.S. 825 (1987) 26

Pennsylvania v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855) 7

Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) 7, 14, 21, 27

Robertson v. *Seattle Audubon Society*, 503 U.S. 429 (1992) 8, 9, 10, 25

Stern v. *Marshall*, 131 S. Ct. 2594 (2011) 14

United States v. *Brown*, 381 U.S. 437 (1965) 12, 20, 21

United States v. *Klein*, 80 U.S. (13 Wall.) 128 (1871) ..... *passim*

United States v. *Padelford*, 76 U.S. (9 Wall.) 531 (1870) 5

Williamson v.Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955) 27

Zivotofsky v. *Kerry*, 135 S. Ct. 2076 (2015) 6

Statutes

Abandoned Property Collection Act, ch. 120, 12 Stat. 820 (1863) 5

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241 16

Foreign Sovereign Immunities Act of 1976, Pub. L. No. 98-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1602 et seq.) 15

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Constitutional Provisions

U.S. Const. amdt. V 15

U.S. Const. art. I, § 9, cl. 3 12

U.S. Const. art. I, § 9, cl. 7 14

U.S. Const. art. IV, § 3 6

INTEREST OF *AMICI*

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For decades, this Court's decision in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), has stood as a central affirmation of judicial independence; its precise holding, however, has been the focus of considerable speculation and disagreement. *Amici* believe that, while disagreement persists among scholars about the scope and theoretical underpinnings of *Klein*, there is also widespread agreement about certain core principles. This brief attempts to articulate those principles and bring them to bear on the present case.

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[1] This brief has been filed with the written consent of the parties, which filed blanket consents with the Clerk of Court. Pursuant to Rule 37.6, counsel for *amici* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

STATEMENT

The statute at issue in this case embodies an appealing policy choice. Respondents here represent victims of state-sponsored terrorism who have obtained default judgments against the Islamic Republic of Iran. Under existing rules of law, Iran possesses no assets within the United States that Respondents may reach to satisfy those judgments. Nonetheless, Respondents brought suit in the United States District Court for the Southern District of New York, attempting to reach almost $2 billion in assets held, through a series of intermediaries, by Petitioner, the National Bank of Iran. Respondents' prospects in that suit were bleak until Congress intervened through a special provision of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502, 126 Stat. 1214, 1258, codified at 22 U.S.C. § 8772, that required the district court to permit Respondents to reach the assets in question.

Amici have little sympathy for the plight in which Petitioner finds itself, and we readily agree with Congress that Respondents' claims cry out for compensation. But by telling a federal court how to decide a single case, and explicitly specifying that its directive would have no effect on any other parties, assets, or controversies no matter how similarly situated, Congress offended two bedrock principles of judicial independence. First, as this Court held in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), Congress may not direct the resolution of a pending case in an Article III court without amending the underlying law. And second, even when Congress *does* enact new law, it must act generally and not with respect to a single case. When Congress

disregards these principles, as it did in the wake of the Civil War, it will often have an appealing case on policy grounds and the parties on the receiving end will often be unattractive. But the core notion of constitutionalism is that we insist on observing constitutional limitations even when the equities of the particular case push most strongly in the other direction.

Like other separation of powers problems, threats to judicial independence often come before this Court "clad, so to speak, in sheep's clothing." *Morrison* v. *Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). Congress may limit federal jurisdiction in certain cases, assign a limited class of claims to non-judicial actors, or play with standards of review. But here, Congress has taken a single case and told the courts how to decide it—a core violation of our most fundamental commitment to judicial independence and integrity. As Justice Scalia has said in another context, "this wolf comes as a wolf." *Id.*

ARGUMENT

Section 8772 violates two closely related principles vital to the separation of powers. First, Congress may not direct the result in a pending case without amending the underlying law. And second, even if it does amend the underlying law, Congress may not do so in a way that applies only to a single case. Whatever else the separation of powers may require when Congress acts in a way that impacts pending litigation, judicial independence surely demands this much. And it is difficult to imagine a statute that would violate these principles more blatantly than the one at issue in this case.

I. Section 8772 violates the principle that Congress may not direct the result in a pending case without amending the underlying law.

This Court's decision in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871), has long been one of the most mysterious and fascinating cases in the Federal Courts canon. Scholars have offered a wide range of diverse and often conflicting interpretations of its meaning. But there has generally been a core of widespread agreement that, whatever else *Klein*'s language and holding may entail, it stands at a minimum for the proposition that Congress may not direct the result in a pending case without amending the underlying law.[2] This principle is generally taken to be quite narrow, given that Congress may amend the law in ways that foreseeably affect pending litigation. But the general idea that Congress may not tell a court how to apply the *existing* law—much less instruct a court to disregard that law—is foundational to judicial independence and the rule of law. And this case plainly violates it.

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[2] *See, e.g.*, Stephen I. Vladeck, *Why* Klein *(Still) Matters: Congressional Deception and the War on Terrorism*, 5 J. Nat'l Sec. L. & Pol'y 251, 252–53 (2011); Howard W. Wasserman, *The Irrepressible Myth of* Klein, 79 U. Cin. L. Rev. 53, 69-70 (2011); Evan H. Caminker, Schiavo *and* Klein, 22 Const. Comment. 529, 533 (2005); William D. Araiza, *The Trouble with* Robertson*: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 Cath. U. L. Rev. 1055, 1079, 1088 (1999); Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 Mercer L. Rev. 697, 718-21 (1995).

A. *United States* v. *Klein* is best understood to forbid Congress from directing the result in a pending case without amending the underlying law.

During the Civil War, Congress enacted the Abandoned Property Collection Act, ch. 120, 12 Stat. 820 (1863), which provided an opportunity for persons whose property was seized in the rebellious states to obtain the proceeds from sale of that property if they could prove that they had not "given any aid and comfort" to the rebellion. Shortly thereafter, President Abraham Lincoln issued a presidential proclamation offering a full pardon—including restoration of rights in seized property—to persons who had been engaged in the rebellion if they took a new loyalty oath. Some years later, in *United States* v. *Padelford*, 76 U.S. (9 Wall.) 531 (1870), this Court held that a person taking such an oath and receiving a pardon would be deemed legally loyal, and therefore entitled to restoration of property under the Abandoned and Captured Property Act. The Reconstruction Congress, generally skeptical toward President Andrew Johnson's conciliatory policy toward the conquered South, responded by enacting a statute barring the use of a pardon to prove loyalty, taking a pardon to be conclusive proof that the claimant *had* been disloyal in fact, and requiring the federal courts to dismiss claims predicated on a pardon for want of jurisdiction.[3]

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[3] *See generally* Wasserman, *supra* note 2, at 59-63; Amanda L. Tyler, *The Story of* Klein: *The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts*, in *Federal Courts Stories* 106 (Vicki C. Jackson & Judith Resnik eds., 2009).

This Court struck down that statute in *Klein*. The Court held that Congress's action was not a valid "exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power" of the Supreme Court. *Klein*, 80 U.S. (13 Wall.) at 146. Even though Congress may have broad power to restrict federal judicial jurisdiction,[4] Chief Justice Chase wrote that Congress may not "prescribe rules of decision to the Judicial Department . . . in cases pending before it." *Id.* Under the statute, "the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely opposite." *Id.* at 147. By so requiring, "Congress has inadvertently passed the limit which separates the legislative from the judicial power." *Id.* Finally, the Court also suggested that by impairing the effect of a presidential pardon, the law "infring[ed] the constitutional power of the Executive." *Id.*[5]

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[4] The Court had decided *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), only two years previously.

[5] *Id.* It may be tempting to read *Klein* simply as a case about the pardon power, holding that that Congress may not impair the full effect of a presidential pardon any more than it may restrict the President's other exclusive powers. *See, e.g.*, *Zivotofsky* v. *Kerry*, 135 S. Ct. 2076 (2015) (holding that Congress may not impair the President's exclusive power to recognize foreign nations). But Chief Justice Chase plainly raised the pardon issue in the alternative: Having found that the statute "passed the limit which separates the legislative from the judicial power," he observed that "[t]he rule prescribed is *also* liable to just exception as impairing the effect of a pardon." *Klein*, 80 U.S. (13 Wall.) at 147; *see also* Caminker, *supra* note 2, at 533 (observing that "the structure and language of the Court's opinion make clear that the two

Klein's language about "prescrib[ing] rules of decision" must be read, however, in conjunction with numerous decisions holding that Congress may amend the law governing pending litigation, and that courts must ordinarily give such amendments retroactive effect if Congress so intends.[6] *Klein* itself recognized as much by distinguishing *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855). In May of 1852, the Court had held that the Wheeling Bridge was an impediment to navigation and ordered it removed. In August of the same year, however, Congress passed an act declaring that the bridge (as well as another bridge in Ohio) was a lawful structure and designating both as federal post roads. In the wake of this new statute, the Court acknowledged that its prior decree could no longer be executed, and it rejected any argument that the new law interfered with the judicial power. *See id.* at 431–32, 435–36.[7] The *Klein*

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separation of powers principles discussed in *Klein* operate in the disjunctive").

[6] *See, e.g., Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 273 (1994); *see also Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 212 (1995) ("When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.").

[7] As Petitioners rightly note, *see* Petitioner's Brief at 36–37, the *Wheeling Bridge* Court also emphasized that Congress's statute altered only the Court's prospective decree directing removal of the bridge. The Court suggested that the case would have come out differently had there been a claim for damages, *Wheeling Bridge*, 59 U.S. (18 How.) at 431, and in fact the Court did enforce the portion of its initial decree requiring the defendants to pay costs, *id.* at 436. But we think the critical aspect of *Wheeling Bridge* was that Congress had permanently, and for

Court found this decision perfectly consistent with its own holding. "No arbitrary rule of decision was prescribed in that case," Chief Justice Chase wrote, "but the court was left to apply its ordinary rules to the new circumstances created by the act." *Klein*, 80 U.S. (13 Wall.) at 146–47. In *Klein* itself, by contrast, "no new circumstances have been created by legislation." *Id.* at 147.

This Court's most recent interpretation of *Klein* shows the narrowness of *Klein*'s core principle, when read in conjunction with Congress's acknowledged power to change the underlying law. In *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992), the Court considered the validity of the Northwest Timber Compromise, a federal statute modifying timber harvesting restrictions in forests home to the endangered spotted owl. The statute was enacted in response to ongoing litigation challenging whether the Bureau of Land Management had adequately considered the impact of permitted logging on the owl. As part of a compromise restricting logging in some areas and permitting it in others, § 318 of the statute designated particular portions of federal land, including that concerned in the ongoing litigation, as open to timber sales, and it mandated that management of the land pursuant to the law's new provisions would be "adequate consideration for the purpose of meeting the statutory requirements that are the basis for" the ongoing litigation, which it referred to by name and docket number. *See id.* at 433–34.

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all legal purposes, altered the underlying legal status of the bridge.

The Ninth Circuit held that § 318 violated *Klein* because it directed the resolution of a pending case without amending the underlying law, but this Court reversed. Assuming that the court of appeals' reading of *Klein* had been correct, the Court nonetheless found that the statute "compelled changes in law, not findings or results under old law." *Robertson*, 503 U.S. at 438. That conclusion, on *Robertson*'s facts, seems perfectly in line with *Klein*'s distinction of the *Wheeling Bridge* case: Congress's intervention exempted the specific provisions of the timber compromise from the general requirement that agencies consider environmental impacts; after all, Congress itself had considered those impacts in formulating the compromise. And although the compromise had the effect of eliminating the legal basis for the plaintiffs' suit, the statute changed the law governing not just that suit but any other challenge to the timber sales affected by the compromise. Hence, "[t]o the extent that [the statute] affected the adjudication of the [pending] cases, it did so by effectively modifying the provisions at issue in those cases." *Id.* at 440.

Although *Robertson* maintained *Klein*'s central distinction between directing law application and amending the underlying law, it illustrates that Congress may still achieve quite specific results when doing the latter, and those results may profoundly affect pending litigation. Critically, *Robertson* concerned the management of federal land, an exercise not of Congress's general Article I legislative powers but rather its Article IV power "to dispose of . . . property belonging to the United States." U.S. Const. art. IV, § 3. Decisions about the disposition of federal assets and resources are

necessarily more targeted than general legislation, and it may be that Congress should be held to a stricter standard when it exercises its general legislative powers.[8] But in any event, Congress's observance of the distinction between directing application and amending law maintains important separation of powers values.

B. Precluding Congress from directing results without changing the law serves important separation of powers values.

This Court's decision in *Robertson* did not expressly adopt the view that *Klein*'s prohibition turns on the difference between directing the outcome of a case and amending the underlying law; it assumed that the court of appeals had been correct in so reading *Klein* but found that the rule had not been violated. *See Robertson*, 503 U.S. at 441. But there is broad agreement among Federal Courts scholars that *Klein* must mean at least this much.[9] Whatever else, if anything, *Klein* may mean, its prohibition on directing results without amending the law serves critical values of judicial independence and integrity.

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[8] *Robertson* also involved the exercise of delegated authority by a federal agency. In this context, it made sense for Congress to substitute its own deliberation on the environmental impact of logging, represented by the compromise legislation, for the statutory requirements that the agency consider those impact that formed the basis of the plaintiffs' suit. Congress was not substituting its judgment for the courts', but rather for the agency's judgment within the framework of a statutory solution to a political controversy over the agency's actions. That, of course, is not this case.

[9] See sources cited in note 2, *supra*.

At least two sets of separation of powers values are salient in this context. The first concerns the protection of litigants from an adjudication process dominated by majoritarian politics. When Congress amends the underlying law, it necessarily deals with the subject of legislation in a more general way than when it simply directs the outcome of a pending case. Congress may be able to foresee the impact of the law on the present litigation, but it must also contemplate that, having been amended generally, the law may govern other unforeseen cases in the future. Even in *Robertson*, the specific mention of the pending cases in the statute was merely illustrative; the act's provisions nonetheless governed any other litigation that might arise concerning the affected timber sales.

The Founders were concerned that the early state legislatures had too often taken judicial matters into their own hands.[10] James Madison thus had this abuse, among others, in mind when he wrote that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[11] Our Constitution requires the concurrence of multiple institutional actors before individuals may be

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[10] *See* Federalist No. 48, at 310-12 (Isaac Kramnick ed., 1987) (1788) (James Madison); *see also Plaut* v. *Spendthrift Farm, Inc.* 514 U.S. 211, 221-22 (1995) (collecting sources); *INS* v. *Chadha*, 462 U.S. 919, 960-62 (1983) (Powell, J., concurring in the judgment) (same).

[11] Federalist No. 47, at 303 (Isaac Kramnick, ed., 1987) (1788) (James Madison).

deprived of liberty or property.[12] This forces legislators, to at least some extent, to enact laws behind a veil of ignorance, knowing that those laws may well be applied to their own constituents or supporters.[13] And it assures individuals that when the law is actually applied to them, it will be in a judicial forum with all the procedural protections that such a forum affords.[14]

The second set of values involves the independence and integrity of the courts themselves. The judiciary's power "to say what the law is," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), is the power not to make law but to interpret and apply it according to the court's own best judgment. Changing the applicable law does not intrude on that judgment. But telling a court what outcome to reach, what legal conclusions to draw, or how to apply the existing law to facts compromises the independence and integrity of the courts. Judicial legitimacy rests critically on the neutral application of general principals. Herbert Wechsler famously

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[12] *See, e.g.*, *United States* v. *Brown*, 381 U.S. 437, 443 (1965) ("For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legialative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will.").

[13] *See, e.g.*, *Cruzan by Cruzan* v. *Director, Missouri Dept. of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) (explaining how the requirement that legialatures may not control to whom the laws will be applied prevents abuse of power).

[14] *See Chadha*, 462 U.S. at 966 (Powell, J., concurring in the judgment) (noting the lack of procedural safeguards when legialatures directly effect deprivations of rights).

said "the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."[15] If Congress may require a court to reach a particular result, without providing a neutral principle on which to rest that decision, then little would remain of Professor Wechsler's notion.

Moreover, this threat to judicial integrity is also a threat to the mechanisms of accountability that ordinarily discipline the democratic process. Congress does not have the same obligation of principled decisionmaking that courts do. But it should not be able to evade democratic responsibility for the choices it makes by misrepresenting those choices as judicial decrees. As Henry Hart explained over a half-century ago,

> It is one thing to exclude completely the federal courts from adjudication; it is quite another to vest the federal courts with jurisdiction to adjudicate but simultaneously restrict the power of those courts to perform the adjudicatory function in the manner they deem appropriate. In the former instance, by wholly excluding the federal courts, Congress loses its ability to draw upon the integrity possessed by the Article III judiciary in the public's eyes. In contrast, where Congress employs the federal courts to implement its

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[15] Herbert L. Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 Harv. L. Rev. 1, 15 (1959).

> deception, the harmful consequences to that judicial integrity are far more significant.[16]

As Professor Hart suggested, Congress may seek to evade responsibility for its laws by contriving that they be announced as legal judgments. That undermines not only the integrity of the courts' decisional processes but also the operation of democratic accountability on the legislative side.

This Court has affirmed the institutional independence and integrity of the Article III courts in ringing terms in cases like *Plaut* v. *Spendthrift Farms, Inc.*, 514 U.S. 211, 239 (1995), and *Stern* v. *Marshall*, 131 S. Ct. 2594, 2608-09 (2011). But it does little good to prevent Congress from reopening final judicial judgments or from reassigning decisionmaking responsibility to non-Article III courts if Congress may simply tell the Article III judiciary how to decide cases in the first place. That is why scholars have interpreted *Klein* as insisting that "[t]he judiciary will not permit its articulate authority to be subverted to serve ends antagonistic to its actual judgment; the judiciary will resist efforts to make it seem to support and regularize that with which it in fact disagrees."[17] In other words, if the

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[16] Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1372 (1953); *see also* Lawrence G. Sager, Klein's *First Principle: A Proposed Solution*, 86 Geo. L. J. 2525, 2529 (1998) (arguing that *Klein* is directed toward preventing the "co-optation of the judiciary's national authority").

[17] Sager, *supra* note 16,. at 2529; *see also* Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of* United States v. Klein, 100 Nw. U. L. Rev. 437, 438-

judiciary interprets the preexisting law to require an outcome, it may not be required to reach the opposite conclusion unless that preexisting law is duly changed.

C. Section 8772 violates *Klein*'s principle by directing a result in pending litigation without amending the underlying law.

Although *amici* have spent years constructing hypotheticals to illustrate *Klein*'s meaning for our students, it is difficult to imagine a clearer violation than the present case. Generally speaking, the category of assets subject to execution in order to satisfy Respondents' default judgments would be governed by New York law, which has adopted Article 8 of the Uniform Commercial Code. As Petitioners explain, *see* Petr's Brief at 3–5, § 8-112(c) of the U.C.C. provides that a creditor may reach only those assets held by the securities intermediary "with whom the debtor's securities account is maintained." Creditors may *not* go more than one step, reaching assets held by another intermediary on behalf of the entity maintaining the debtor's account. *See* U.C.C. § 112 cmt. 3. Because Petitioner is a foreign central bank, the federal Foreign Sovereign Immunities Act provided another layer of protection for "property . . . of a foreign central bank or monetary authority held for its own account." 28 U.S.C. § 1611(b)(1).

Subsequent statutes have modified the underlying federal protections, amending the FSIA

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39 (2006) (reading *Klein* to forbid Congress from enlisting the judiciary in deceiving the electorate as to the actual state of the law).

to permit suits against foreign sovereigns for certain acts of terrorism, *see* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241, and permitting execution against assets blocked by the President under certain economic sanctions statutes, *see* Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337. While these statutes had predictable effects on certain sorts of claims, they articulated general rules of decision. Moreover, they neither modified the rule that plaintiffs may execute judgments only against assets that actually belong to the guilty party nor provided a test for ownership independent of state law provisions like U.C.C. § 8-112.

Section 8772 of the Iran Threat Reduction and Syria Human Rights Act of 2012, however, represents a profoundly different approach. That statute focused solely on particular assets against which Respondents sought execution in a particular lawsuit—identified by name and docket number in the statutory text—and directed that those assets "shall be subject to execution or attachment in aid of execution in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran." 22 U.S.C. § 8772(a)(1). Congress stated that its purpose was "to ensure that Iran is held accountable for paying the judgments described in paragraph (1)," as part of "the broader goals of this Act to sanction Iran." *Id.* § 8772(a)(2).

Although the line between directing a result and amending the underlying law may sometimes be fuzzy, it is not fuzzy here. Section 8772 does not articulate a new rule for when assets may be reached; it provides no new principle to replace

U.C.C. 8-112(c). Rather, it simply directs that the specific assets here "shall be subject to execution or attachment." There is no general principle whatsoever—only a mandatory result.

Moreover, the breathtaking specificity of the statute makes clear that no new law has been made. The law does not apply to a general class of assets, but rather only to "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." 22 U.S.C. § 8772(b); *see also* § 8772(c)(2) (providing that "[n]othing in this section shall be construed . . . to apply to assets other than the assets described in subsection (b)"). Subsection (c) clarifies, moreover, that the statute does not "affect the availability, or lack thereof, of a right to satisfy a judgment in any other action against a terrorist party in any proceedings other than proceedings referred to in subsection (b)." 22 U.S.C. § 8772(c)(1). The statute is truly a ticket for this day and train only. If other terrorism plaintiffs seeking to execute identical default judgments filed an identical lawsuit, they would not get the benefit of § 8772.[18] Nor does the statute govern similarly situated claimants in any other context. If this statute is taken to amend the underlying law, then there is truly no distinction between so doing and directing the result in a pending case.

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[18] If the district court were to dismiss this action without prejudice on the basis of some technical defect in the complaint, it is not even clear that § 8772 would apply to *Respondents* after they re-filed their lawsuit.

It makes no difference that the statute leaves two determinations for the district court to make. Section 8772(a)(2) requires two judicial findings as a predicate to execution or attachment: "the court shall determine whether Iran holds equitable title to, or the beneficial interest in, the assets described in subsection (b) and that no other person possesses a constitutionally protected interest in the assets described in subsection (b) under the Fifth Amendment to the Constitution of the United States." 22 U.S.C. § 8772(a)(2). Neither of these preconditions in this case is in dispute here—nor, of course, is the statute even applicable to any other circumstances in which they *might* be in dispute.

But in any event a *Klein* violation does not require that Congress direct *every* finding in the case.[19] Congress could not save a statute directing a particular result in a pending case simply by requiring the court to first find that it had personal jurisdiction of the dispute. Nor could Congress require a court to find the defendant liable then leave it to determine damages, or direct it to certify a particular class action, or even require the court to find against the defendant with respect to a particular defense. The offense against judicial independence occurs when Congress requires a court to resolve a particular issue in accord with Congress's wishes, rather than the court's own best view of the underlying law and facts. *Klein* does not ask for some sort of on-balance judgment as to

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[19] The statute in *Klein* itself required at least a preliminary finding that the claimant's case rested on a pardon, rather than on other proof of loyalty.

whether the court has been left with anything meaningful to do.

We do not deny that it is often difficult to draw a clear line between legislative directions to decide a pending case in a particular way under the existing law and amendments to the underlying law that effectively resolve pending cases. And in the close cases, this Court and the lower courts have generally deferred to Congress, interpreting the acts in question as legitimate examples of the latter phenomenon rather than unconstitutional instances of the former. That is all to the good. But *Klein*'s principle—narrow as it is—has stood as an affirmance of the courts' fundamental independence and a deterrent to legislation that treads close to the line. It is no coincidence that Congress rarely legislates in ways that even arguably direct a decision in pending cases. But if this Court, by upholding § 8772, tells Congress that it can tell the courts how to decide cases, then Congress is likely to tell the courts how to decide cases more often.

II. Section 8772 invades the province of the courts by purporting to legislate with respect to a single case.

Chief Justice Marshall wrote in *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87 (1810), that "[i]t is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules would seem to be the duty of other departments." *Id.* at 136. This principle—that legislation may invade the judicial province when it lacks a general character—is distinct from the problem in *Klein*. That case, after all, involved a general directive to resolve *all* claims for restoration

of property predicated on a presidential pardon in accord with Congress's view that pardons were proof of *dis*loyalty, contrary to the Court's prior decision in *Padelford*. The statute potentially governed a number of different suits by different claimants. Here, however, Congress has singled out a single case for its mandate. Our contention is that even if one views § 8772 as having modified the underlying law with respect to execution on assets held by intermediaries, the fact that the statute does so only with respect to *these assets* and *these parties*, and only in *this case*, is sufficient to doom the law.

A. Congress ordinarily may not legislate with respect to a single case.

Petitioners have collected ample historical evidence that Chief Justice Marshall's understanding of the critical distinction between the legislative and judicial functions was widely shared by the founding generation and consistently followed throughout our history. Petr's Brief at 22–25, 29–35. The clearest example of this understanding in the constitutional text is the Bill of Attainder Clause, U.S. Const. art. I, § 9, cl. 3, which prohibits "trial by legislature." *United States v. Brown*, 381 U.S. 437, 442 (1965). That Clause, of course, addressed a specific set of historical abuses under English and early American practice, and this Court's cases have confined its ambit to legislative "punishment." *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). But the Court has also made clear that the Bill of Attainder Clause does not exhaust the requirement of legislative generality. As this Court said in *Brown*, "the Bill of Attainder Clause not only was intended as one implementation of the general

principle of fractionalized power, but also reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness, of, and levying appropriate punishment upon, specific persons." *Brown*, 381 U.S. at 445.[20]

These concerns about legislative trials are no less salient when Congress acts to disadvantage particular persons in particular cases, even when those disadvantages do not qualify as "punishment" for attainder purposes. The legislative process is designed primarily to identify and vindicate the majority will, not provide due process for the minority.[21] As Justice Powell pointed out in *INS* v. *Chadha*, 462 U.S. 919 (1983), "[t]he Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the "tyranny of shifting majorities." *Id.* at 961 (Powell, J., concurring in the judgment). He concluded that "trial by a legislature lacks the safeguards necessary to prevent the abuse of power." *Id.* at 962.

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[20] *See also Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 241-43 (1995) (Breyer, J., concurring in the judgment) (observing that the principle of legislative generality is expressed both in the Bill of Attainder Clause *and* "in the Constitution's 'general allocation of power'") (quoting *INS* v. *Chadha*, 462 U.S. 919, 962 (1983) (Powell, J., concurring in the judgment)).

[21] *See, e.g.*, *INS* v. *Chadha*, 462 U.S. 919, 966 (1983) (Powell, J., concurring in the judgment) ("Unlike the judiciary or an administrative agency, Congress is not bound by established substantive rules. Nor is it subject to the procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or an agency adjudicates individual rights.").

This requirement of legislative generality is our primary safeguard against any number of oppressive legislative actions, and it is reflected in a number of other constitutional provisions. As Justice Scalia has explained

> What assures us that those limits [of humane treatment] will not be exceeded is the same constitutional guarantee that is the source of most of our protection-what protects us, for example, from being assessed a tax of 100% of our income above the subsistence level, from being forbidden to drive cars, or from being required to send our children to school for 10 hours a day, none of which horribles are categorically prohibited by the Constitution. Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.[22]

These safeguards are defeated if Congress may single out highly-specific applications for its laws.

The form of § 8772, which mandates relief in a single case for specific plaintiffs for claims brought under generally applicable principles of tort, raises a further problem. If Congress may specify special relief in particular cases, or set aside generally applicable defenses or limitations on remedies for particular litigation, then it may undermine the

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[22] *Cruzan*, 497 U.S. at 300 (Scalia, J., concurring). *See also* Araiza, *supra* note 2, at 1089-1106 (discussing various constitutional requirements of generality).

generality even of laws phrased in general terms. No one would dispute that the laws prescribing liability for terrorist atrocities or the general prohibition on reaching assets through multiple financial intermediaries are general laws. But if Congress is permitted to amend those laws to exempt only particular persons in particular cases, then it can destroy the initial evenhandedness of those enactments. One may doubt, for example, whether Congress will pierce the protections of foreign central banks not directly holding assets in the United States as they pertain to countries with whom the United States is on good terms. No law is general if Congress may pick and choose when litigation under it will succeed and when it will fail.

This Court's decision in *Nixon* did reject a claim that *any* legislation directed at a single person is necessarily unconstitutional, denying that the Clause "limit[s] Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all." 433 U.S. at 471. As Petitioner rightly points out, the law at issue in *Nixon* applied to a wide range of potential cases concerning President Nixon's papers, not just a single litigation. Moreover, *Nixon* was an extraordinary case in which the subject of the legislation "constituted a legitimate class of one." *Id.* at 472. Decisions by the courts of appeals have likewise recognized that sometimes Congress may legislate with respect to a legitimately unique problem (although these cases typically govern more than one potential *case*). In *National Coalition to Save Our Mall* v. *Norton*, 269 F.3d 1092 (D.C. Cir. 2001), for example, the D.C. Circuit found that legislation specific to the World War II memorial on the National Mall was legitimately

confined to "a unique public amenity." *Id.* at 1097. What is required is some account of why the legislation is so confined. Courts may accord substantial deference to such accounts while still requiring that they be either articulated or inferable from the circumstances.

There are, of course, other sorts of instances in which Congress acts in a way directed at particular individuals or entities or even at particular litigation. Since the beginning of the Republic, for example, Congress has enacted "private bills" that may pay a judgment against the United States, waive the United States' sovereign immunity, or release the Government's own claims. But these circumstances are quite different from legislation aimed at resolving a single case. First, all of them involve the exercise of either Congress's Article IV power to "dispose" of government property or its general implicit authority to regulate the United States' own conduct in litigation—neither of which is a general legislative power and may be subject to less stringent requirements of generality.[23] Second, as Petitioners point out, these sorts of private bills typically involve public rights over which Congress typically has broad discretion, *see* Petr's Brief at 41; we are unaware of any private bills altering the outcome of litigation between private parties. Third, many private bills operate to facilitate litigation—not to direct its outcome. Bills to pay judgments operate to permit recovery after litigation has ended; waivers of government claims will typically occur prior to its

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[23] It is worth noting that both *Nixon* and *National Coalition to Save Our Mall* likewise involved the disposition of government property.

commencement; and neither undermines the rights of private litigants. Finally, private bills to pay judgments (and arguably bills to waive sovereign immunity) are enacted in service of another constitutional mandate, which is that public expenditures must be pursuant to "Appropriations made by Law," U.S. Const. art. I, § 9, cl. 7. That principle surely permits, and sometimes requires, a greater degree of specificity than regulatory legislation specifying the rights and duties of private actors.

In *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992), this Court declined to consider a legislative generality challenge to a federal statute on the ground that it had not been properly presented to the court of appeals and not advanced by a party in the Supreme Court. *See id.* at 441. Even if the Court had reached the question, the statute in *Robertson* applied by its terms to a significant swath of important federal lands over a significant period of time, and it governed all controversies pertaining to timber sales on those lands and in that time period. Moreover, the limited scope of the timber compromise was determined, in significant part, by the limited habitat of the northern spotted owl. The present litigation presents a much clearer case.

B. Section 8772 violates the principle of legislative generality.

This case squarely presents the question that the Court reserved in *Robertson*. As § 8772(b) makes clear, the Act applies only to "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern

District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." Section 8772(c) then clarifies that the Act does not "affect the availability, or lack thereof, of a right to satisfy a judgment in any other action against a terrorist party in any proceedings other than proceedings referred to in subsection (b)." The act is not simply a general rule that is intended to influence a pending case; rather, it only *applies* to a single pending case. Even if other cases are indistinguishable in terms of their facts or the legal claims at issue, § 8772 cannot apply.

This case illustrates the wisdom of the Framers' insistence on legislative generality. Petitioner—the national bank of a nation that has branded America "the Great Satan" and carried out any number of reprehensible acts against its citizens—is hardly popular in Congress; it is eminently understandable why Congress might wish to impose unique disadvantages upon it. And Respondents here, the victims of tragic injuries, are highly sympathetic; compensating them is a laudable public purpose. But in a nation that treasures its commitment to the rule of law, the dispute here must be resolved according to neutral principles. If Congress were simply to take resources from the Bank in order to compensate Respondents, for example, it would be obliged to pay compensation. *See* U.S. Const. amdt. V.[24] Having elected instead to let Respondents seek compensation through private

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[24] *See also Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1071-72 (1992) (Stevens, J., dissenting) (emphasizing that Takings law has "frequently looked to the *generality* of a regulation of property") (emphasis in original); *accord Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 835 n.4 (1987).

litigation, Congress may not effectively render its own verdict by specifying a rule to govern only this single case.

It is true, of course, that legislatures constantly draw distinctions and classifications among persons subject to the law. And when they do so, they need not always adopt a general principle and follow it to its logical conclusion; rather, "the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955). Even then, of course, the classification must be rational and non-arbitrary. *Id.* at 488. But where the legislative classification confines the law's effect to a single *case*, pending in the federal courts, additional concerns of separation of powers come into play. In that area, this Court has insisted upon "prophylactic" rules, "establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995).[25]

A law confined to a single pending case is a legislative trial, and therefore unconstitutional.

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[25] *Plaut* doubted "[t]he premise that there is something wrong with particularized legislative action." 514 U.S. at 239 n.9. But the law in *Plaut* affected many different cases, not just one, *see id.* at 227, and therefore did not raise the spectre of Congress actually appropriating the judicial function to itself.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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No. 14-770

IN THE

Supreme Court of the United States

BANK MARKAZI,
THE CENTRAL BANK OF IRAN,
Petitioner,

v.

DEBORAH D. PETERSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

This case concerns nearly $2 billion of bonds in which Bank Markazi, the Central Bank of Iran, held an interest in Europe as part of its foreign currency reserves. Plaintiffs, who hold default judgments against Iran, tried to seize the assets. While the case was pending, Congress enacted a special provision of the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. §8772, directed to this case. By its terms, that provision applies only to "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." *Id.* §8772(b). It expressly disclaims any effect on "any [other] proceedings." *Id.* §8772(c)(1). "In order to ensure that Iran is held accountable for paying the judgments," §8772 provides that, notwithstanding any other state or federal law, the assets "shall be subject to execution" upon only two findings—essentially, that Bank Markazi has a beneficial interest in them and that no one else does. *Id.* §8772(a)(1)-(2). The question presented is:

Whether §8772—a statute that effectively directs a particular result in a single pending case—violates the separation of powers.

PARTIES TO THE PROCEEDINGS BELOW

Due to its length, the list of parties to the proceedings below is set forth in full in the appendix to the petition for a writ of certiorari (Pet. App. 130a-144a).

TABLE OF CONTENTS

	Page
Preliminary Statement	1
Opinions Below	2
Statement of Jurisdiction	3
Constitutional, Statutory, and Treaty Provisions Involved	3
Statement	3
I. Statutory Framework	3
A. Article 8 of the Uniform Commercial Code	3
B. The Foreign Sovereign Immunities Act	5
C. The FSIA's Terrorism Exceptions	7
II. Proceedings Below	9
A. Proceedings Before the District Court	9
1. The Restraints and Blocking Order	9
2. Congress's Enactment of § 8772	11
3. The District Court's Decision	14
B. The Court of Appeals' Opinion	15
Summary of Argument	17
Argument	20
I. Section 8772 Violates the Separation of Powers by Purporting To Change the Law Solely for a Single Pending Case	22
A. Section 8772 Usurps the Judicial Function of Deciding Individual Cases	22

TABLE OF CONTENTS—Continued

	Page
B. Section 8772 Defies the Nation's History and Traditions	29
C. Section 8772 Has No Support in This Court's Precedents	35
II. Section 8772 Effectively Dictates the Outcome of a Specific Pending Case	42
A. Congress May Not Direct the Outcome of Specific Cases	43
B. Section 8772 Effectively Dictated the Outcome of This Case	45
III. Bank Markazi's Sovereign Status Is Irrelevant	50
Conclusion	54
Appendix – Relevant Constitutional, Statutory, and Treaty Provisions	1a

TABLE OF AUTHORITIES

Page(s)

CASES

Baggs's Appeal, 43 Pa. 512 (1862) 31, 32

Biodiversity Assocs. v. *Cables*, 357 F.3d 1152 (10th Cir. 2004), cert. denied, 543 U.S. 817 (2004) 33

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Calderon-Cardona v. *Bank of N.Y. Mellon*, 770 F.3d 993 (2d Cir. 2014), petition for cert. filed, No. 15-122 (July 24, 2015) 8

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TABLE OF AUTHORITIES—Continued

Page(s)

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Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*, 501 U.S. 350 (1991) 39

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Merrill v. *Sherburne*, 1 N.H. 199 (1818) 31

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Miller v. *French*, 530 U.S. 327 (2000) 37, 49

Mt. Graham Coal. v. *Thomas*, 89 F.3d 554 (9th Cir. 1996) 33

Nat'l Coal. To Save Our Mall v. *Norton*, 269 F.3d 1092 (D.C. Cir. 2001), cert. denied, 537 U.S. 813 (2002) 33

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TABLE OF AUTHORITIES—Continued

Page(s)

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TABLE OF AUTHORITIES—Continued

Page(s)

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CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. art. I 21

U.S. Const. art. I, § 9 41

U.S. Const. art. III ..... *passim*

U.S. Const. art. III, § 2 22

TABLE OF AUTHORITIES—Continued

Page(s)

Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 ..... *passim*
28 U.S.C. § 1604 6
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28 U.S.C. § 1605A 8
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28 U.S.C. § 1605A(c) 8
28 U.S.C. § 1605A(d) 8
28 U.S.C. § 1609 6
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28 U.S.C. § 1610(a) 6
28 U.S.C. § 1610(a)(7) 7
28 U.S.C. § 1610(b) 6
28 U.S.C. § 1610(b)(3) 7
28 U.S.C. § 1610(g) 8
28 U.S.C. § 1611(b) 6
28 U.S.C. § 1611(b)(1) 6, 28

Pub. L. No. 101-121, § 318(b)(6)(A), 103 Stat. 701, 747 (1989) 37, 38

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TABLE OF AUTHORITIES—Continued

Page(s)

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§ 1, 119 Stat. at 15 34
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22 U.S.C. § 8772(a)(1)(A) 27
22 U.S.C. § 8772(a)(1)(C) 27, 28, 52
22 U.S.C. § 8772(a)(2) ..... *passim*
22 U.S.C. § 8772(a)(2)(A) 13, 47
22 U.S.C. § 8772(b) 2, 12, 25
22 U.S.C. § 8772(c)(1) 2, 12, 26, 39
22 U.S.C. § 8772(d)(3) 28, 52

28 U.S.C. § 1254(1) 3

6 Stat. 1-235 (1789-1819) 40

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TABLE OF AUTHORITIES—Continued

Page(s)

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Resolution No. 2 of Feb. 15, 1816, 6 Stat. 180 41
Act of Apr. 20, 1816, ch. 59, 6 Stat. 162 41
Act of Apr. 26, 1816, ch. 90, 6 Stat. 166 40
Act of Apr. 27, 1816, ch. 108, 6 Stat. 169 41
Act of Apr. 29, 1816, ch. 157, 6 Stat. 175 40
Act of Apr. 11, 1818, ch. 50, 6 Stat. 206 41
Act of Apr. 18, 1818, ch. 72, 6 Stat. 208 41
Act of Mar. 2, 1819, ch. 53, 6 Stat. 228 41
Act of Mar. 3, 1863, ch. 120, 12 Stat. 820 43
§1, 12 Stat. at 820 43
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Uniform Commercial Code ..... *passim*
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U.C.C. art. 8 prefatory note (1994) 4
U.C.C. §8-112(c) 4, 10, 27
U.C.C. §8-112 cmt. 3 ..... 5, 27
U.C.C. §8-505 4
U.C.C. §8-506 4
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Page(s)

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LEGISLATIVE MATERIALS

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TABLE OF AUTHORITIES—Continued

Page(s)

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IN THE

Supreme Court of the United States

NO. 14-770

BANK MARKAZI,
THE CENTRAL BANK OF IRAN,
Petitioner,

v.

DEBORAH D. PETERSON, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR PETITIONER

PRELIMINARY STATEMENT

This case concerns Congress's enactment of a new rule for a single pending case—identified by caption and docket number—that has no prospective effect beyond transferring nearly $2 billion from one party to others in compensation for past injuries.

The case began when plaintiffs, who hold default judgments against Iran, tried to seize securities in which Bank Markazi, the Central Bank of Iran, held an interest as part of its foreign currency reserves in Europe. While the case was pending, plaintiffs persuaded Congress to enact a statute designed to change the outcome of this one case.

The result was a special provision of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214, 1258, codified as 22 U.S.C. §8772. Section 8772 applies *only* to "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." 22 U.S.C. §8772(b). The statute expressly disclaims any effect on "any [other] proceedings." *Id.* §8772(c)(1).

Section 8772 explicitly sets forth Congress's goal: "to ensure that Iran is held accountable for paying the judgments." 22 U.S.C. §8772(a)(2). To that end, the statute supersedes all contrary laws, state and federal, for this one case. *Id.* §8772(a)(1). In their place, §8772 establishes a new rule under which the assets at issue "shall be subject to execution" if the court makes two findings—essentially, that Bank Markazi has a beneficial interest in the assets and that no one else does. *Id.* §8772(a)(1)-(2).

That legislative intrusion into a single pending case—changing the law so plaintiffs can collect nearly $2 billion from their adversary—violates the separation of powers. Deciding individual cases is a judicial function, not a legislative one. If the distinction between the legislative and judicial functions means anything, Congress cannot change the law solely for one case to ensure that its favored litigant prevails. Section 8772 is foreign to this Nation's constitutional traditions and threatens the independence of the federal judiciary. It cannot be sustained.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 758 F.3d 185 (2d Cir. 2014). The opinions and orders of the district court (Pet. App. 13a-127a) are unreported.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on July 9, 2014. It denied rehearing and rehearing en banc on September 29, 2014. Pet. App. 128a. Bank Markazi filed the petition for a writ of certiorari on December 29, 2014, and the Court granted the petition on October 1, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND TREATY PROVISIONS INVOLVED

Relevant provisions of Article III of the U.S. Constitution; the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8772; the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602 *et seq.*; the Terrorism Risk Insurance Act of 2002, 28 U.S.C. § 1610 note; the Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899; and Article 8 of the Uniform Commercial Code are set forth in an appendix to this brief. App., *infra*, 1a-44a.

STATEMENT

I. STATUTORY FRAMEWORK

This case arises against the backdrop of state property law as well as federal law governing the immunity of foreign sovereigns and their property.

A. Article 8 of the Uniform Commercial Code

Article 8 of the Uniform Commercial Code governs the ownership and transfer of securities. Before the advent of modern securities trading, the owner of a financial instrument typically held a physical certificate. The owner of 10,000 shares of Coca-Cola stock, for example, would hold certificates issued by Coca-Cola representing that ownership, which entitled him to vote and receive dividends from Coca-Cola.

In modern financial markets, securities owners rarely possess such certificates. Instead, when buying stock, they acquire a "security entitlement" against an intermediary such as a bank or broker. The securities intermediary, in turn, owns the underlying financial asset or owns a security entitlement in that asset through yet another intermediary, so that it can provide the benefits of ownership to its customer. See generally U.C.C. art. 8 prefatory note (1994); 7A William D. Hawkland, *et al.*, *Uniform Commercial Code Series* §8-101 (2013); Carl S. Bjerre & Sandra M. Rocks, *The ABCs of the UCC: Article 8: Investment Securities* 1-9 (2d ed. 2014).

U.C.C. Article 8 and its foreign counterparts define the property rights in those security entitlements. Under Article 8, the owner of a security entitlement has the right to receive payments, cast votes, and exercise other incidents of ownership of the underlying financial asset. U.C.C. §§8-505 to 8-508. But the owner does not hold those rights against the issuer. Instead, he holds them against his securities intermediary. *Ibid.* In that manner, Article 8 enables the widespread holding and sale of securities without cumbersome transfers and re-registrations of the underlying certificates.

Because Article 8 is built on potentially lengthy chains of ownership from intermediary to intermediary, it carefully identifies the owners of attachable property rights in security entitlements. In particular, §8-112(c) provides that "[t]he interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon the securities intermediary *with whom the debtor's securities account is maintained.*" U.C.C. §8-112(c) (emphasis added). Thus, if a debtor holds a security entitlement in a bond with Bank A, which in turn holds an entitlement in that bond with Bank B, the

debtor's property consists solely of the entitlement the debtor holds against Bank A. Creditors may be able to seize the debtor's security entitlement at Bank A. But they cannot go beyond that and attach Bank A's holdings at Bank B to satisfy the debtor's obligations.

The official comment explains:

> Process is effective only if directed to the debtor's *own* security intermediary. If Debtor holds securities through Broker, and Broker in turn holds through Clearing Corporation, *Debtor's property interest is a security entitlement against Broker.* Accordingly, Debtor's creditor cannot reach Debtor's interest by legal process directed to the Clearing Corporation.

U.C.C. §8-112 cmt. 3 (emphasis added); see also 7A Hawkland, *supra*, §8-112:01 ("Since [the debtor's] property interest is 'located' at [its intermediary], * * * the only proper subject of legal process by [the debtor's] creditors would be [that intermediary]. [The intermediary's intermediary] does not have possession of some item of property in which [the debtor] has a direct property interest * * * ").

B. The Foreign Sovereign Immunities Act

While property interests are normally created and defined by state law, federal law governs the extent to which foreign sovereigns and their property are subject to process in the Nation's courts.

1. For most of the country's history, foreign sovereigns were completely immune from suit. See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). In 1952, however, the State Department adopted the "restrictive" theory that recognized limited exceptions. *Id.* at 486-487. Two decades later, Congress codified those

immunity principles in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§1602 *et seq.*).

The FSIA separately addresses the immunity of foreign sovereigns from jurisdiction, and the immunity of sovereign property from execution and attachment. With respect to the former, the FSIA preserves the general rule that a foreign state and its agencies and instrumentalities "shall be immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. §1604. The statute lists narrow exceptions to that jurisdictional immunity in §1605.

Sovereign *property* was traditionally immune from execution, even under the restrictive theory. See H.R. Rep. No. 94-1487, at 8 (1976). Consistent with that history, the FSIA provides that, in general, "property in the United States of a foreign state shall be immune from attachment arrest and execution." 28 U.S.C. §1609. The FSIA created narrow exceptions, but only for certain categories of "property in the United States." *Id.* §1610(a)-(b).

Section 1611(b) provides an additional, special immunity for central bank assets. "Notwithstanding the provisions of section 1610," it states, "the property of a foreign state shall be immune from attachment and from execution, if * * * the property is that of a foreign central bank or monetary authority held for its own account * * * " 28 U.S.C. §1611(b)(1); see *NML Capital, Ltd.* v. *Banco Central de la República Argentina*, 652 F.3d 172, 186-195 (2d Cir. 2011), cert. denied, 133 S. Ct. 23 (2012).

2. The FSIA focuses on immunity, not substantive liability. As a result, it did not originally address whether a juridically separate agency or instrumentality could be

held liable for the sovereign's own debts, or vice versa. See H.R. Rep. No. 94-1487, at 12, 28-30.

This Court decided that issue in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"). "[G]overnment instrumentalities established as juridical entities distinct and independent from their sovereign," it held, "should normally be treated as such." *Id.* at 626-627. The Court recognized only two narrow exceptions: where the entities are alter egos and where the corporate form is abused to work a fraud or injustice. *Id.* at 629-630.

C. The FSIA's Terrorism Exceptions

In 1996, Congress created a new exception to jurisdictional immunity for terrorism-related claims. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §221, 110 Stat. 1214, 1241 (formerly codified at 28 U.S.C. §1605(a)(7)). That exception permits suits against certain sovereigns for acts of terrorism or material support therefor. 28 U.S.C. §1605A(a).

The 1996 amendments also added new exceptions to immunity from execution. One provides that a foreign state's property "used for a commercial activity in the United States" is not immune from execution for terrorism-related judgments. 28 U.S.C. §1610(a)(7). A similar exception applies to certain property of agencies or instrumentalities. *Id.* §1610(b)(3).

Following those amendments, scores of suits were filed against foreign sovereigns. Typically, the sovereign did not appear, and plaintiffs obtained default judgments for tens or hundreds of millions of dollars. See Jennifer K. Elsea, Congressional Research Service, *Suits Against Terrorist States by Victims of Terrorism* 67-74 (Aug. 8, 2008). Plaintiffs, however, faced difficulty collecting. See

id. at 5-68. Congress responded by enacting further exceptions to immunity.

In 2002, Congress enacted §201 of the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, 116 Stat. 2322, 2337, to permit execution against assets the President had "blocked" (*i.e.*, frozen) under certain economic-sanctions statutes. It provides:

> Notwithstanding any other provision of law, * * * in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605A or 1605(a)(7) * * * , the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution * * *

28 U.S.C. §1610 note §201(a). By its terms, TRIA applies only to "blocked assets *of* that terrorist party"—*i.e.*, property *owned* by that party. See *Heiser* v. *Islamic Republic of Iran*, 735 F.3d 934, 937-941 (D.C. Cir. 2013); cf. *Calderon-Cardona* v. *Bank of N.Y. Mellon*, 770 F.3d 993, 1000-1002 (2d Cir. 2014), petition for cert. filed, No. 15-122 (July 24, 2015).

In 2008, Congress amended the FSIA yet again. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, §1083, 122 Stat. 3, 338. It created an express cause of action for terrorism claims while broadening the available damages. 28 U.S.C. §1605A(c)-(d). It expanded the assets available for execution. *Id.* §1610(g). And it allowed plaintiffs who had already litigated their case to judgment to assert claims under the new statute. Pub. L. No. 110-181, §1083(c)(2), 122 Stat. at 342.

II. PROCEEDINGS BELOW

This case concerns Congress's latest attempt to facilitate collection by terrorism plaintiffs. This time, however, Congress chose to change the rules for only a single case, enacting a statute that had no forward-looking effect beyond requiring one party to pay money to other parties.

A. Proceedings Before the District Court

Petitioner Bank Markazi is the Central Bank of Iran. Pet. App. 2a. Founded in 1960, the bank is an independent and distinct legal entity, separate from the Iranian government. C.A. App. 1340. Under Iranian law, it is treated as a joint stock company except as otherwise provided by Iran's Monetary and Banking Law. *Ibid.*

Like other central banks, Bank Markazi holds foreign currency reserves to carry out monetary policies such as maintaining price stability. C.A. App. 1330. Like other central banks, it often maintains the reserves in bonds issued by foreign sovereigns or "supranationals" like the European Investment Bank. *Id.* at 1331, 1146-1149.

Plaintiffs hold billions of dollars of default judgments against the Islamic Republic of Iran arising out of terrorist attacks by organizations that allegedly received support from Iran. Pet. App. 2a, 52a-53a n.1, 116a. Bank Markazi is not a party to any of those judgments and is not alleged to have been involved in the attacks. See *id.* at 52a-53a n.1.

1. *The Restraints and Blocking Order*

As part of its foreign currency reserves, Bank Markazi held $1.75 billion in security entitlements in foreign government and supranational bonds at Banca UBAE S.p.A., an Italian bank. Pet. App. 2a; C.A. App. 1329-1332, 1779. UBAE, in turn, held corresponding security entitlements

in an account with another intermediary, Clearstream Banking, S.A., in Luxembourg. Pet. App. 2a, 57a-59a. Clearstream, in turn, held security entitlements in an account at Citibank, N.A., in New York. *Id.* at 2a.[1]

Upon learning of those assets, plaintiffs did not try to attach Bank Markazi's security entitlements at UBAE in Italy, as U.C.C. Article 8 required. Instead, they served restraining notices on Clearstream and Citibank, seeking to attach the assets *Clearstream* held at Citibank in New York. Pet. App. 3a, 62a. Clearstream moved to vacate the restraints. On June 23, 2009, the district court "agree[d] with Clearstream that the assets * * * are governed by NY UCC 8-112(c)" and that, "[u]nder the plain meaning of NY UCC 8-112(c), Clearstream is not a proper garnishee" because "Clearstream does not currently carry on its books * * * an account in the name of the Islamic Republic of Iran." *Id.* at 126a. Nonetheless, the court left the restraints in place so plaintiffs could pursue a fraudulent conveyance theory. *Ibid.*

In June 2010, plaintiffs commenced this action against Bank Markazi, UBAE, Clearstream, and Citibank for turnover of the restrained assets under TRIA. Pet. App. 3a, 62a-63a. Later, in February 2012, the President issued an order blocking all "property and interests in property of the Government of Iran, including the Central Bank of Iran, that are in the United States," citing purported "deceptive practices" and "deficiencies in Iran's anti-money laundering regime." Executive Order No. 13,599, 77 Fed. Reg. 6659, 6659 (Feb. 5, 2012). Citi-

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[1] The bonds matured during the proceedings below, leaving Citibank with the cash proceeds. Pet. App. 61a. At the time of the district court's decision, the assets were worth $1.895 billion. *Id.* at 23a.

bank then reported the restrained assets as blocked by that order. Pet. App. 64a.

Bank Markazi moved to dismiss, and plaintiffs moved for summary judgment. Pet. App. 3a, 55a. Bank Markazi urged that the security entitlements Clearstream held against Citibank in New York were not Bank Markazi's property under U.C.C. Article 8. As a result, they were not "assets of" Bank Markazi within the meaning of TRIA and were not subject to execution under that statute. *Id.* at 96a-97a. Even if they were, Bank Markazi argued, the assets were entitled to central bank immunity under §1611(b) of the FSIA. *Id.* at 102a. Bank Markazi also invoked the Treaty of Amity between the United States and Iran, which prohibits unreasonable or discriminatory treatment of Iranian companies and requires that their separate juridical status be respected. *Id.* at 101a; see Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, arts. III.1, IV.1, Aug. 15, 1955, 8 U.S.T. 899, 902-903.

2. *Congress's Enactment of §8772*

Plaintiffs' lawyers then lobbied Congress to change the outcome of the case. According to press accounts, one of the plaintiffs' counsel in this case "[d]rafted" legislation to "preempt[] Uniform Commercial Code provisions that insulate indirectly held assets from judgment creditors." Julie Triedman, *Can U.S. Lawyers Make Iran Pay for 1983 Bombing?*, Am. Law., Oct. 28, 2013. A lobbyist working with the government relations team at one of the plaintiffs' law firms then "pressed lawmakers to add [the] provision to a new Iran sanctions bill." *Ibid.*

Press coverage reported that "lawyers and lobbyists for victims of terrorist attacks were quietly jockeying" over the legislation, and that Senator Bob Menendez was "'working with all of the plaintiff groups to ensure that

the approximately $2.5 billion in Iranian blocked assets located in New York are available.'" Kate Ackley, *Rival Groups of Terror Victims Square Off*, Roll Call, May 22, 2012. Senator Menendez issued a press release explaining that the bill "makes it so that the [plaintiffs] will be able to attach two billion in Iranian Central Bank assets being held at a New York Bank." *Menendez Hails Banking Committee Passage of Iran Sanctions Legislation* (Feb. 2, 2012).

The result was § 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214, 1258, codified as 22 U.S.C. § 8772. Section 8772 explicitly targets this one case: It applies only to "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." 22 U.S.C. § 8772(b). The statute explicitly disclaims any effect on any other proceeding: "Nothing in this section," it declares, "shall be construed * * * to affect the availability, or lack thereof, of a right to satisfy a judgment * * * in *any proceedings other than [these] proceedings* * * * " *Id.* § 8772(c)(1) (emphasis added).

For this one case, § 8772 fundamentally alters the governing rules, preempting state law and superseding other federal requirements. It provides:

> [N]otwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law, a financial asset that is—
>
> (A) held in the United States for a foreign securities intermediary doing business in the United States;

> (B) a blocked asset (whether or not subsequently unblocked) * * * , and
>
> (C) equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran * * * , that such foreign securities intermediary or a related intermediary holds abroad,
>
> shall be subject to execution or attachment in aid of execution in order to satisfy any judgment * * *

22 U.S.C. §8772(a)(1).

The statute prescribes two "determination[s]" the court must make. 22 U.S.C. §8772(a)(2). "In order to ensure that Iran is held accountable for paying the judgments," the court must determine (1) "whether Iran holds equitable title to, or the beneficial interest in, the assets," and (2) "that no other person possesses a constitutionally protected interest in the assets." *Ibid.* Although §8772 purports to preclude attachment to the extent a third party has "equitable title to, or a beneficial interest in, the assets," the statute excludes a "custodial interest of a foreign securities intermediary or a related intermediary that holds the assets abroad for the benefit of Iran." *Id.* §8772(a)(2)(A).

Section 8772 thus overrides U.C.C. Article 8 for this one case. Under Article 8, Bank Markazi's only potentially attachable property interest was in the security entitlements it held at UBAE in Italy. Clearstream may have held corresponding security entitlements in its Citibank account in New York. But the only property that could be seized to satisfy Bank Markazi's debts was its rights against UBAE. Section 8772 changed that, allowing plaintiffs to seize Clearstream's New York assets as if Bank Markazi owned them, while directing the court to

ignore Clearstream's or UBAE's stake in those assets as a mere "custodial interest."

3. *The District Court's Decision*

On February 28, 2013, the district court denied Bank Markazi's motion to dismiss and granted summary judgment to plaintiffs. Pet. App. 52a-124a.

The district court held that §8772 rendered U.C.C. Article 8 irrelevant. Section 8772, it held, "specifically trumps 'any other provision of law' and specifically permits execution on the assets specifically at issue in this litigation." Pet. App. 97a. Notwithstanding the prior ruling that Article 8 barred attachment, the court also held that the assets were subject to execution regardless of §8772, relying partly on purported statements of ownership by Bank Markazi and partly on its view that Bank Markazi's U.C.C. argument was "sophistry." *Id.* at 97a-98a & n.10, 101a.

With respect to the Treaty of Amity, the court ruled that §8772 rendered the issue moot by superseding the Treaty. Pet. App. 102a. It also found the Treaty inapplicable because, in its view, the Treaty could not be used to "circumvent congressional acts or authorized legal actions." *Ibid.* The court likewise rejected Bank Markazi's claim to central bank immunity, observing that §8772 "expressly preempt[s] any immunity." *Id.* at 103a. The court further held that TRIA trumps central bank immunity, and that the blocking order's reference to "deceptive practices" "suggests that the activities of Bank Markazi are not central banking activities." *Ibid.*

Finally, the court turned to §8772's required findings. "On this record and as a matter of law," it held, "no other entity could have an equitable or beneficial interest" in the assets. Pet. App. 111a. "Clearstream does not allege

* * * that it has legal title or the right to acquire that title for the Blocked Assets." *Id.* at 112a. "UBAE disclaims any 'legally cognizable interest' in the Citibank proceeds." *Ibid.* And Citibank simply "maintain[s] [an] account on behalf of another." *Ibid.* In short, "[t]here simply is no other possible owner of the interests here other than Bank Markazi." *Id.* at 113a.

Bank Markazi argued that §8772 violated the separation of powers by effectively dictating the outcome of this one case. Pet. App. 114a. Dismissing that argument in a single paragraph, the court stated: "The statute does not itself 'find' turnover required; such determination is specifically left to the Court." *Id.* at 114a-115a. The statutory findings, it opined, were not "mere fig leaves" but left "plenty for this Court to adjudicate." *Id.* at 115a.

After denying reconsideration, the court entered a judgment directing turnover of the assets. Pet. App. 13a-30a, 31a-51a. The judgment expressly released Citibank and Clearstream from any liability to Bank Markazi, and it enjoined Bank Markazi from asserting claims against them. *Id.* at 24a-26a.

B. The Court of Appeals' Opinion

The court of appeals affirmed. Pet. App. 1a-12a.

At the outset, the court acknowledged Bank Markazi's contentions that the assets were not subject to execution under TRIA because they were not "assets of" Bank Markazi, and that even if they were, they were protected by central bank immunity. Pet. App. 5a. But the court declined to reach those issues. "Congress," it explained,

"has changed the law governing this case by enacting 22 U.S.C. §8772." *Ibid.*[2]

The court of appeals then turned to Bank Markazi's separation-of-powers argument. The court recognized that, in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), this Court struck down a statute that directed courts to treat pardons of Confederate sympathizers as conclusive evidence of disloyalty. Pet. App. 8a. Congress, *Klein* declared, may not "prescrib[e] a rule of decision to the courts." *Ibid.* But the court of appeals also noted that this Court distinguished *Klein* in *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992). Pet. App. 8a-9a. *Robertson* upheld a statute passed to resolve two environmental suits by providing that management of forests consistent with the statute's terms would be sufficient to satisfy other environmental requirements. *Ibid.*

The court of appeals found §8772 comparable to the statute in *Robertson*. "[Section] 8772 does not compel judicial findings under old law," it held, but rather "changes the law applicable to this case." Pet. App. 9a. And like the statute in *Robertson*, it "explicitly leaves the determination of certain facts to the courts." *Ibid.*

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[2] The court of appeals rejected Bank Markazi's argument that §8772 violated the Treaty of Amity. Any conflict between the two, it held, must be resolved in favor of "the later-enacted §8772." Pet. App. 5a. The court also denied the conflict. It acknowledged that the Treaty requires treatment of Iranian companies to be "'fair and equitable' and no 'less favorable than that accorded nationals and companies of any third country.'" *Id.* at 7a. But the court saw "no country-based discrimination," *ibid.*—despite the statute's multiple references to Bank Markazi's Iranian status and avowed purpose of "ensur[ing] that Iran is held accountable for paying the judgments," 22 U.S.C. §8772(a)(1)-(2).

Bank Markazi argued that §8772 "effectively compels only one possible outcome, as Iran's beneficial interest in the assets had been established by the time Congress enacted §8772." Pet. App. 10a. The court did not suggest otherwise. But it believed that *Robertson* made that fact irrelevant, "as the statute there was specifically enacted to resolve two pending cases." *Ibid.* "Indeed," the court added, "it would be unusual for there to be more than one likely outcome when Congress changes the law for a pending case with a developed factual record." *Ibid.*

The court conceded that "there may be little functional difference between §8772 and a hypothetical statute directing the courts to find that the assets at issue in this case are subject to attachment under existing law." Pet. App. 10a. But it held that, under *Robertson*, "§8772 does not cross the constitutional line." *Ibid.*

The court of appeals denied rehearing, Pet. App. 128a, but stayed the mandate, *id.* at 129a. This Court granted review. 136 S. Ct. 26 (2015).

SUMMARY OF ARGUMENT

I. Section 8772 prescribes a rule for a single pending case—identified by caption and docket number—with no prospective effect beyond transferring nearly $2 billion from one party to the others. The statute is an unprecedented incursion on the judicial power.

A. Article III grants the judiciary, not Congress, the power to decide "cases" and "controversies." The Framers chose those words to distinguish the *judicial* power of deciding specific cases from the *legislative* power of enacting general law. Legislation that purports to change the law for a single pending case, with no prospective impact beyond the payment of money, is inconsistent with that design.

That is what §8772 does. The statute alters the rule for a single case identified by docket number in the U.S. Code. It expressly disclaims any effect on any other proceeding. And it has no prospective effect at all. The impact could not have been more dramatic: The statute eliminated every defense Bank Markazi had raised.

B. Section 8772 defies the Nation's history and traditions. The Constitution was adopted against the backdrop of legislative interference in judicial proceedings at the behest of private factions. The separation of powers was designed to put an end to those abuses. Early state decisions enforced those principles by striking down statutes that targeted particular cases—laws far less extreme than the one here.

Congress's failure to enact comparable legislation throughout the Nation's history is compelling evidence that no such power exists. If Congress could change the law for a single pending case, it surely would have done so before now. But §8772 is virtually unprecedented.

C. Congress has undoubted authority to enact laws with forward-looking application, even if they affect pending disputes. But this Court has never approved a statute that applies only to a single pending *case*. The statutes this Court has upheld, moreover, involved matters such as prospective relief or public rights, as to which Congress has long been understood to have broad authority.

In *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), for example, this Court upheld a statute that designated a bridge a federal post-road to prevent its demolition. The statute targeted a specific *bridge*, but it did not purport to change the law

only for one *case*. The dispute, moreover, involved prospective relief and public rights—not money damages.

Robertson v. *Seattle Audubon Society*, 503 U.S. 429 (1992), does not resolve the issue here either. This Court explicitly declined to address whether Congress could amend the law for a single pending case. The statute there did not do that. And like *Wheeling Bridge*, the case concerned prospective relief and public rights—the ongoing management of federal forests.

Nor did *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), decide this issue. That case struck down a generally applicable statute that purported to reopen final judgments in securities cases. The Court's holding that Congress may not reopen final judgments, either generally or in specific cases, does not mean Congress can change the outcome of a single pending case.

II. Section 8772 also suffers from a second constitutional defect: It effectively dictates the outcome of this one case.

A. In *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), this Court struck down a statute that purported to prescribe rules of decision for the judicial branch. That holding was consistent with a long line of authority making clear that legislatures may not dictate the outcome of pending cases, any more than they may reopen final judgments.

B. Section 8772 effectively dictated the outcome here. The statute expressly recites that its purpose is "to *ensure* that Iran is held accountable for paying the judgments." 22 U.S.C. §8772(a)(2) (emphasis added). And the legislative record leaves no doubt that Congress knew the statute would have that effect.

Although §8772 purported to require two judicial determinations, the findings were makeweights. They amounted only to findings that the assets at issue were traceable to Iran rather than someone else. And by the time Congress enacted the statute, both findings were foregone conclusions.

III. Bank Markazi's sovereign status does not alter the foregoing analysis. That status was not the basis for the decision below and therefore need not and should not be addressed by this Court in the first instance.

Bank Markazi's sovereign status is irrelevant in any event. Although plaintiffs and the government urge that *sovereign immunity* was historically determined by the Executive Branch case by case, §8772 does far more than revoke immunity. It overrides *substantive* state property law under the Uniform Commercial Code as well as *substantive* federal law regarding juridical status. Besides, the Executive Branch's former practice of deciding immunity case by case does not mean *Congress* may also intervene in specific pending cases—particularly now that Congress has withdrawn sovereign immunity from Executive control and committed it to judicial determination under defined legal standards.

ARGUMENT

"The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers"—a system fraught with "abuses of legislative interference with the courts at the behest of private interests and factions." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 219-221 (1995). They felt "a sharp necessity to separate the legislative from the judicial power." *Id.* at 221. Their response was Article III—an "'inseparable element of the constitutional system of checks and balances' that 'both defines the power and protects the in-

dependence of the Judicial Branch.'" *Stern* v. *Marshall*, 131 S. Ct. 2594, 2608 (2011).

The Constitution grants Congress broad legislative authority under Article I. But the power to decide individual cases and controversies belongs to the judiciary under Article III. Section 8772 cannot be reconciled with that allocation of authority. By its terms, § 8772 purports to create a new rule—displacing otherwise dispositive state and federal law—for a *single pending case*, identified by docket number in the U.S. Code. The provision has no effect on *any* other case. And it has no meaningful prospective effect either: It simply directs the court to ignore otherwise governing law and follow a different rule, in this one case, when deciding whether one party must turn over nearly $2 billion to other parties as compensation for past injuries. Such a provision is unprecedented in our Nation's history and crosses the line from making laws to deciding cases—a role Article III reserves to the courts.

More than a century ago, in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), this Court struck down a statute that purported to "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 146. Congress, the Court held, had "passed the limit which separates the legislative from the judicial power." *Id.* at 147. Whatever the scope of *Klein* and its progeny today, § 8772 goes far beyond constitutional bounds.

While Article III "safeguards the role of the Judicial Branch," *CFTC* v. *Schor*, 478 U.S. 833, 850 (1986), "[t]he ultimate purpose of this separation of powers is to protect the liberty and security of the governed," *Metro. Wash. Airports Auth.* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). "When struc-

ture fails, liberty is always in peril." *Pub. Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in judgment). Section 8772 is a structural failure of unprecedented proportions.

I. SECTION 8772 VIOLATES THE SEPARATION OF POWERS BY PURPORTING TO CHANGE THE LAW SOLELY FOR A SINGLE PENDING CASE

Section 8772 is a radical departure from this Nation's traditions. It does not purport to change the law generally or for a class of circumstances. It has no meaningful prospective effect at all. Instead, § 8772 purports to alter the law for a single pending case concerning the payment of money from one party to others. Congress expressly denied the statute *any application whatsoever* beyond this one, specifically identified case.

Such "good for this case only" legislation is virtually unheard of in the history of the Republic—and with reason. The separation of powers presumes that the "law" has some existence independent from its application in a particular case. If Congress can simply commandeer the judiciary and dictate how courts must decide individual cases before them, Congress might as well take the bench and rule on cases by legislative decree. Our system of separated powers does not allow that intrusion on the judicial function. It is foreclosed by the Constitution's text and structure. It is foreclosed by historical practice. And it is foreclosed by common sense.

A. Section 8772 Usurps the Judicial Function of Deciding Individual Cases

1. The Constitution's text makes clear that the power to decide individual cases is a judicial rather than legislative function. Article III extends "[t]he judicial power" to particular categories of "cases" or "controversies." U.S.

Const. art. III, §2. The Framers chose those words carefully to distinguish the *judicial* power of deciding particular cases from the *legislative* power of enacting general pronouncements of law. See 1 Noah Webster, *An American Dictionary of the English Language* (1828) (defining "case" as "[a] cause or suit in court" and "controversy" as "a case in which opposing parties contend for their respective claims before a tribunal"); 2 *The Records of the Federal Convention of 1787*, at 430 (Farrand ed., 1911) (jurisdiction "limited to cases of a Judiciary nature").

That distinction between the power to enact *general* laws and the power to decide *specific* cases was well understood by the Framers. As Locke explained, one of the "Bounds * * * set to the Legislative Power" is that "[t]hey are to govern by promulgated establish'd Laws, *not to be varied in particular Cases*." John Locke, *Two Treatises of Government* bk. 2, § 142, at 295 (4th ed. 1713) (emphasis altered). Conversely, Tocqueville wrote that a defining "characteristic of judicial power" was "that it pronounces on *special cases*, and not upon general principles." Alexis de Tocqueville, *Democracy in America* 79 (Reeve trans., 1838) (emphasis added). *The Federalist* drew the same distinction, describing the judicial power as the "decision of * * * causes," *The Federalist No. 81*, at 481-482 (Hamilton) (Rossiter ed., 1961), and the legislative power as "prescrib[ing] the rules by which the duties and rights of every citizen are to be regulated," *The Federalist No. 78*, at 465 (Hamilton); see also *Address of the Council of Censors* (Feb. 14, 1786), in *Vermont State Papers* 531, 540 (Slade ed., 1823) ("The legislative body is, in truth, by no means competent to the determination of causes between party and party, nor was, by our Con-

stitution, or that of any other country who make pretences to freedom, ever considered so * * * ").

Justice Iredell made the same point in *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798), shortly after the Constitution's ratification. Describing the Connecticut legislature's "habit of exercising a general superintending power over its courts of law," he wrote that "[i]t may, indeed, appear strange to some of us, that in any form, there should exist a power to grant, with respect to suits depending or adjudged, new rights of trial, new privileges of proceeding, not previously recognized and regulated by positive institutions." *Id.* at 398. "The power * * * is judicial in its nature; and whenever it is exercised, as in the present instance, it is an exercise of judicial, not of legislative, authority." *Ibid.* Chief Justice Marshall agreed twelve years later in *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87 (1810), writing that "[i]t is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." *Id.* at 136.

That understanding persisted throughout the nineteenth century. "[T]hat which distinguishes a judicial from a legislative act," Cooley wrote, is that "the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases falling under its provisions." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 91 (1868). In a particularly apt passage, he added: "'That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be

enforced.'" *Ibid.*; see also *Report of the Sixth Annual Meeting of the American Bar Association* 14-15 (1883) (remarks of Charles C. Bonney) ("[T]he application of law to a state of facts, for the determination of a controversy, is a pure judicial function * * * "). That remains the common understanding today: "[J]udges handle individual cases; the legislature generalizes." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1176 (1989).

That is not to say that every statute addressing a specific person or problem is unconstitutional. Congress has enacted private bills granting individual relief against the United States since the Framing, and laws that alter the prospective effects of a decree have long been deemed constitutional. See pp. 35-37, 40-41, *infra*. But Congress cannot simply pass a law requiring one party in a pending judicial proceeding to pay its opponents nearly $2 billion simply because that is the result Congress wants. If the distinction between law-making and case-deciding has any content, it prohibits Congress from "say[ing] that a court must award Jones $35,000." *Lindh* v. *Murphy*, 96 F.3d 856, 872 (7th Cir. 1996) (en banc), rev'd on other grounds, 521 U.S. 320 (1997). That, however, is exactly what § 8772 does.

2. Section 8772 alters the rule for a single pending case concerning the payment of money for a past injury. Congress could not have made its intent to target this one case any clearer. Section 8772 expressly declares that it applies only to "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." 22 U.S.C. § 8772(b). It explicitly disclaims any broader impact:

The statute has no effect on "*any other action* against a terrorist party in *any proceedings other than [the] proceedings referred to.*" *Id.* §8772(c)(1) (emphasis added). The statute thus changes the law for this case alone.

Consequently, if other plaintiffs sought to execute against the same assets based on identical claims, their case would be subject to a completely different rule. Indeed, if plaintiffs themselves filed another action against the same assets on identical claims, that suit too would be treated differently. This one case enjoys special treatment only because plaintiffs' lawyers persuaded Congress to change the law solely for this one case. Such a statute—which has no existence or effect independent of its application in a single judicial proceeding—is simply not a "law" within the customary meaning of the term.

Section 8772's impact could not have been more dramatic. The statute eliminated every defense Bank Markazi had raised. Before §8772's enactment, state law precluded plaintiffs from seizing the assets at issue. Bank Markazi held its foreign exchange reserves in the form of security entitlements at UBAE in Italy. Pet. App. 2a; C.A. App. 1329-1332, 1602-1604. Plaintiffs could not reach those assets because they were beyond the court's territorial jurisdiction. See *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2257 (2014) (courts "generally lack authority in the first place to execute against property in other countries").

Plaintiffs therefore sought to seize Clearstream's corresponding security entitlements in New York. But state law prohibited that end-run: Under U.C.C. Article 8, "[t]he interest of a debtor in a security entitlement may be reached by a creditor *only* by legal process upon the securities intermediary *with whom the debtor's securities account is maintained*"—in this case, UBAE in Italy.

U.C.C. §8-112(c) (emphasis added). Creditors "cannot reach Debtor's interest by legal process" directed to other intermediaries further down the chain. U.C.C. §8-112 cmt. 3; see 7A Hawkland, *supra*, §8-112:01. That is why the district court originally ruled that, "[u]nder the plain meaning of NY UCC 8-112(c), Clearstream is not a proper garnishee." Pet. App. 126a. Because Clearstream's security entitlements were not Bank Markazi's property under the U.C.C., moreover, they also were not "assets of" Bank Markazi under TRIA and therefore could not be seized under that statute. See *Heiser* v. *Islamic Republic of Iran*, 735 F.3d 934, 937-941 (D.C. Cir. 2013).

Section 8772 simply overrode those principles for this one case. The statute allows the plaintiffs in this case to seize property "held in the United States for a foreign securities intermediary" that is "*equal in value* to a financial asset of Iran * * * that such foreign securities intermediary or a related intermediary holds abroad." 22 U.S.C. §8772(a)(1)(A), (C) (emphasis added). The statute expressly "preempt[s] any inconsistent provision of State law" such as the U.C.C. *Id.* §8772(a)(1). Applying that new, one-case-only regime, the district court allowed plaintiffs to satisfy their judgments against Iran by seizing Clearstream's assets in New York. Pet. App. 111a-113a. And to ensure the effectiveness of that decision, it granted Clearstream a discharge of any liability to Bank Markazi while enjoining Bank Markazi from pursuing any claims against it. *Id.* at 26a.

Congress did not stop there: It also rewrote substantive federal law. Under *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), plaintiffs could not generally seize Bank Markazi's assets to satisfy Iran's debts. Rather, as

a "juridical entit[y] distinct and independent from [its] sovereign," Bank Markazi had to be "treated as such." *Id.* at 626-627. But not for this case: Section 8772 expressly applies to property "equal in value to a financial asset of Iran, *including an asset of the central bank or monetary authority of the Government of Iran.*" 22 U.S.C. §8772(a)(1)(C) (emphasis added); see also *id.* §8772(d)(3). The statute thus overrode federal law governing juridical status and respect for the corporate form.

Section 8772 also rewrote the law of sovereign immunity. Under the FSIA, "property * * * of a foreign central bank or monetary authority held for its own account" is immune from execution. 28 U.S.C. §1611(b)(1). For this one case, however, §8772 permits execution "notwithstanding * * * any provision of law relating to sovereign immunity." 22 U.S.C. §8772(a)(1).

Finally, §8772 abrogates solemn treaty obligations. The Treaty of Amity prohibits unreasonable or discriminatory treatment of Iranian companies and requires that their juridical status be respected. See Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, arts. III.1, IV.1, Aug. 15, 1955, 8 U.S.T. 899, 902-903. But §8772 abrogates Bank Markazi's separate status and subjects it to uniquely oppressive treatment precisely because it is Iranian. 22 U.S.C. §8772(a)(1)-(2).

By systematically eliminating every defense Bank Markazi had raised for this one case alone, Congress changed the outcome as surely as if it had presided over the case and decided it in plaintiffs' favor. That result is antithetical to the rule of law that the separation of powers is designed to protect.

B. Section 8772 Defies the Nation's History and Traditions

The Framers' decision to separate the judicial and legislative functions was no accident. It was a deliberate response to "abuses of legislative interference with the courts at the behest of private interests and factions." *Plaut*, 514 U.S. at 220-221. Section 8772 is a paradigmatic example of those abuses.

1. The Framers were well-acquainted with those evils in England. During the Interregnum, "Parliament gave a Council of State powers to arrest, interrogate, and imprison." Michael Kent Curtis, *In Pursuit of Liberty: The Levellers and the American Bill of Rights*, 8 Const. Comment. 359, 377 (1991). Parliament sometimes presided over specific cases—most infamously over bills of attainder, in which Parliament would hear evidence on criminal charges and then vote on the guilt of the accused. See, *e.g.*, *Fenwick's Case*, 13 How. St. Tr. 537 (1696). Legislative interference with the ordinary judicial process was a recurring source of complaint. See, *e.g.*, John Lilburne, *A Defiance to Tyrants* 5 (1648) (demanding that Parliament not "interrupt the ordinary course of justice in the several Courts" or "intermeddle in cases of private interest"); *Leveller Manifestoes of the Puritan Revolution* 263, 266 (Wolfe ed., 1944) (reprinting Lilburne's 1648 petition demanding that "[n]o particular cause, whether Criminal or other, which comes under the Cognizance of the ordinary Courts of Justice, may be determined by this House, or any Committee thereof").

The colonies suffered through similar excesses. Colonial legislatures often passed special legislation that "modif[ied] the position of named parties before the law." Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 Mich. L. Rev. 247, 258 (1914);

e.g., Act of Nov. 3, 1784, 5 *Laws of New Hampshire* 21 (Metcalf ed., 1916) (extending limitations period for pending case); Act of Feb. 5, 1789, 5 *Laws of New Hampshire*, *supra*, at 395 (annulling deeds). Legislatures so often "extend[ed] their deliberations to the cases of individuals" that many "consider[ed] an application to the legislature, as a shorter and more certain mode of obtaining relief from hardships and losses, than the usual process of law." *A Report of the Committee of the Council of Censors* 6 (Phila. 1784). Legislatures sometimes even conducted "the actual trial of civil or criminal cases." Mary Patterson Clarke, *Parliamentary Privilege in the American Colonies* 15 (1943); see *id.* at 14-60 (collecting cases); *Judicial Action by the Provincial Legislature of Massachusetts*, 15 Harv. L. Rev. 208 (1901) (same).

The Framers witnessed "many instances" where legislatures "decided rights which should have been left to judicial controversy." Thomas Jefferson, *Notes on the State of Virginia* 126 (Shuffelton ed., 1999). Special laws were "pushed through the legislatures by unscrupulous men" to serve private ends. Charles Binney, *Restrictions upon Local and Special Legislation in State Constitutions* 6 (1894). Legislative "[i]nterferences with [private rights] were evils which had more perhaps than anything else, produced th[e] [constitutional] convention." 1 Farrand, *supra*, at 134 (Madison).

2. The Framers thus fully appreciated that "'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" *The Federalist No. 78*, at 466 (Hamilton) (quoting 1 Baron de Montesquieu, *The Spirit of Laws* 181 (Nugent trans., 10th ed. 1773)). They separated the legislative and judicial powers to prevent legislative interference with specific cases.

Early courts repeatedly enforced that design, striking down legislation far less intrusive than the statute here.

In *Lewis* v. *Webb*, 3 Me. (3 Greenl.) 326 (1825), for example, certain bondsmen belatedly discovered they were liable on a debt, and persuaded the legislature to enact a law extending their time to appeal. Maine's highest court invalidated the law as an invasion of the judicial power. "It is one of the striking and peculiar features of judicial power," the court held, "that it is displayed in the decision of controversies between contending parties * * * " *Id.* at 332. "[I]t can never be within the bounds of legitimate legislation to enact a special law, or pass a resolve dispensing with the general law, in a particular case, and granting a privilege and indulgence to one man, by way of exemption from the operation and effect of such general law, leaving all other persons under its operation." *Id.* at 336.

Similarly, in *Merrill* v. *Sherburne*, 1 N.H. 199 (1818), the losing party to a lawsuit petitioned the legislature for a special act permitting him to refile his claims. The legislature obliged, but the court held the statute unconstitutional because it targeted a specific case: "It is the province of judicial power * * * to decide private disputes 'between or concerning persons,'" the court explained, and "of legislative power to regulate publick concerns and to 'make laws' for the benefit and welfare of the state." *Id.* at 204.

In *Baggs's Appeal*, 43 Pa. 512 (1862), certain parties missed the deadline to file claims against an estate but convinced the legislature to extend the deadline for their case alone. The court struck down the statute. "Properly speaking," it held, "all *laws* are rules for *classes* of cases, and never for a particular case or instance. That can be only a rescript, judgment, or decree that decides a par-

ticular case, or any part of it, and it is naturally and essentially the result of judicial and not of legislative functions * * * * " *Id.* at 516.

Many other cases reached similar results. See, *e.g.*, *Tate's Ex'rs* v. *Bell*, 12 Tenn. (4 Yer.) 202, 207 (1833) (invalidating statute that operated, "not as a general provision, but to reach particular individuals"); *Jones' Heirs* v. *Perry*, 18 Tenn. (10 Yer.) 59, 69 (1836) (striking down act that directed sale of specific private lands because it lacked "permanent, uniform, and universal character" and instead amounted to a "judicial decree"); *Reiser* v. *William Tell Saving Fund Ass'n*, 39 Pa. 137, 146-147 (1861) (invalidating act that exempted certain associations from general usury laws). All those decisions reflected the settled understanding that statutes changing the law solely for one case represent impermissible legislative exercise of the judicial power.[3]

3. Longstanding congressional practice reflects that same understanding. If Congress thought it had the power to change the law for a single pending case between other parties over the payment of money, it surely would have exercised that authority before now. Congress's failure to invoke such authority over the past two centuries is "reason to believe that the power was thought not to exist." *Printz* v. *United States*, 521 U.S. 898, 905 (1997). Such "prolonged reticence would be

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[3] Many States went further and adopted express constitutional prohibitions on special legislation. See Binney, *supra*, at 130-131 (counting 39 States by 1894). Those provisions swept far beyond the issues at stake here by prohibiting special legislation in general, not just statutes changing the law for one judicial proceeding. But the provisions rested at least in part on separation-of-powers concerns. See *id.* at 3-4 (noting "judicial" aspect of special legislation).

amazing if such interference were not understood to be constitutionally proscribed." *Plaut*, 514 U.S. at 230.

Federal cases challenging legislation as improperly directing the outcome of a specific case have largely arisen only in the past few decades. Most involved public rights—claims for relief against the United States that Congress has historically been permitted to resolve outside an Article III forum. See pp. 35-37, *infra*.[4] The handful of others concerned *generally applicable* legislation that was merely alleged to have been enacted for the *purpose* of affecting specific litigation.[5] Statutes like §8772 that *explicitly single out* a pending case between other parties are anomalous. Indeed, §8772 is such an extreme departure from the separation of powers that it

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[4] See *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 402-405 (1980) (waiver of government's res judicata defense); *Pope* v. *United States*, 323 U.S. 1, 8-10 (1944) (payment of government debt); *Ecology Ctr.* v. *Castaneda*, 426 F.3d 1144, 1148-1150 (9th Cir. 2005) (timber harvesting); *Shawnee Tribe* v. *United States*, 423 F.3d 1204, 1216-1218 & n.13 (10th Cir. 2005) (disposition of government property); *City of Chicago* v. *U.S. Dep't of Treasury*, 423 F.3d 777, 783-784 (7th Cir. 2005) (FOIA); *Biodiversity Assocs.* v. *Cables*, 357 F.3d 1152, 1170-1171 (10th Cir. 2004) (timber harvesting), cert. denied, 543 U.S. 817 (2004); *Nat'l Coal. To Save Our Mall* v. *Norton*, 269 F.3d 1092, 1095-1097 (D.C. Cir. 2001) (construction on federal land), cert. denied, 537 U.S. 813 (2002); *Mt. Graham Coal.* v. *Thomas*, 89 F.3d 554, 557-558 (9th Cir. 1996) (similar).

[5] See *Ileto* v. *Glock, Inc.*, 565 F.3d 1126, 1139-1140 (9th Cir. 2009) (upholding statute preempting suits against firearm manufacturers and dealers because it "applied to all cases" even if "members of Congress wanted to preempt *this* pending case"), cert. denied, 560 U.S. 924 (2010); *City of New York* v. *Beretta U.S.A. Corp.*, 524 F.3d 384, 395-396 (2d Cir. 2008) (similar), cert. denied, 556 U.S. 1104 (2009); *Cook Inlet Treaty Tribes* v. *Shalala*, 166 F.3d 986, 990-991 (9th Cir. 1999) (upholding general statute despite allegation that it was "directed at this litigation"); *Maher* v. *Strachan Shipping Co.*, 68 F.3d 951, 957 & n.8 (5th Cir. 1995) (similar).

would be condemned by legal systems far less committed to the principle than our own.[6]

Perhaps the most salient example of intervention dates not to 1805, or to 1905, but to 2005. During a protracted dispute over the withdrawal of life support from a comatose Terri Schiavo, Congress enacted a law granting a federal court jurisdiction to hear claims on her behalf. See An Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, §1, 119 Stat. 15, 15 (2005). Congress directed the court to decide the case "de novo," without regard to prior state-court rulings or otherwise applicable exhaustion or abstention bars. *Id.* §2.

Members of Congress vociferously objected to that disregard of "what the writers of the Constitution [meant] when they said separation of powers." 151 Cong. Rec. 5455 (Mar. 20, 2005) (Rep. Frank). "Congress deals with broad policy," while "[i]ndividual adjudications are made by judges." *Ibid.*; see also *id.* at 5457 (Rep. Davis) ("Congress as a judge and a jury" is "a threat to our democracy"); *id.* at 5468 (Rep. Conyers) ("By passing legislation which takes sides in an ongoing legal dispute, we will be casting aside the principle of the separation of powers. We will be abandoning our role as a serious legislative branch * * * ").

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[6] See, *e.g.*, *Zielinski* v. *France*, App. No. 24846/94, 1999-VII Eur. Ct. H.R. 95, 120-121 ¶57 (1999) ("[T]he rule of law and the notion of fair trial * * * preclude any interference by the legislature—other than on compelling grounds of the general interest—with the administration of justice designed to influence the judicial determination of a dispute."); *Stran Greek Refineries* v. *Greece*, App. No. 13427/87, 301-B Eur. Ct. H.R. (ser. A) 65, 82 ¶¶49-50 (1994) (similar); Anna Jasiak, *Changing the Rules Mid-Game: Legislative Interference in Specific Pending Cases*, 4 Vienna J. Int'l Const. L. 20 (2010) (comparing European and American standards).

Ultimately, the courts assumed the statute's constitutionality and denied relief on other grounds. See *Schiavo ex rel. Schindler* v. *Schiavo*, 357 F Supp. 2d 1378, 1382-1383 (M.D. Fla. 2005), aff'd, 403 F.3d 1223 (11th Cir. 2005). Even then, Judge Birch urged that the statute "invades the province of the judiciary and violates the separation of powers." *Schiavo ex rel. Schindler* v. *Schiavo*, 404 F.3d 1270, 1273-1274 (11th Cir. 2005) (Birch, J., concurring in denial of rehearing).

While the Terri Schiavo statute was a marked departure from Congress's traditional role, it pales in comparison to §8772. Section 8772 does not merely alter the legal standards for granting or withholding prospective relief. It purports to change the law in a dispute over whether one party must pay its opponents almost $2 billion in compensation for past injuries. That is an unprecedented legislative exercise of judicial power.

C. Section 8772 Has No Support in This Court's Precedents

This Court's decisions have long allowed Congress to enact laws with meaningful prospective effects, even if they affect the outcome of pending cases. The Court has also recognized Congress's broad authority over traditional public rights—claims against the federal government that Congress need not even commit to an Article III forum. See *Stern*, 131 S. Ct. at 2611-2615. None of those cases comes close to holding that Congress can enact a statute that alters the law solely for a single pending case between other parties over the payment of money.

1. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), highlights the unprecedented nature of this legislation. In that case, this Court had previously ruled that a particular bridge was an ob-

struction to navigation and ordered its demolition. *Id.* at 429. In the wake of that decision, Congress enacted a statute making the bridge a federal post-road to prevent its removal. *Ibid.* The Court upheld the statute. "So far * * * as this bridge created an obstruction to the free navigation of the river," it held, that circumstance was "modified by this subsequent legislation." *Id.* at 430.

That statute bears no resemblance to §8772. The statute in *Wheeling Bridge* did not change the law solely for one case. Congress made the bridge a federal post-road for all purposes and all cases, foreclosing any action to require its removal by any party at any time. *Wheeling Bridge* might come closer to this case if Congress had passed a statute deeming the bridge a federal post-road solely for one pending judicial proceeding. But it did not.

Critical to the Court's decision, moreover, was the nature of the relief. The earlier decree directing removal of the bridge was "executory, a continuing decree." 59 U.S. (18 How.) at 431. If the right to free navigation was "modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced." *Id.* at 431-432. The case thus involved Congress's authority to alter the law in a way that affected the propriety of a prospective decree—not a claim for money damages. The case also concerned public rights—an area where Article III courts traditionally have not exercised exclusive authority. "[I]nterference with the free navigation of the river," the Court explained, "constituted an obstruction of a public right secured by acts of congress." *Id.* at 431.

The Court specifically contrasted the dispute with a common-law claim for damages. "[I]f the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages," it explained, "the

right to these would have passed beyond the reach of the power of congress." 59 U.S. (18 How.) at 431; see also *The Clinton Bridge*, 77 U.S. (10 Wall.) 454, 463 (1870) ("very different considerations would have arisen" if the "action had been at common law for damages"); *Miller* v. *French*, 530 U.S. 327, 345-347 (2000) (similar).

That contrast is fatal here. Section 8772 does not concern navigation rights in federal waters or other public rights. Nor does it alter an entitlement to prospective relief. It creates a new rule for a single pending case designed to ensure that one party pays its opponents nearly $2 billion for past injuries. Nothing in *Wheeling Bridge* supports such a statute.

2. *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992), is similarly inapposite. In that case, Congress enacted a statute in response to two lawsuits alleging that the government's plans to allow timber harvesting on federal lands violated environmental laws. *Id.* at 432. The statute set forth new rules to govern the validity of the logging plans and provided that "management of areas according to [the new rules] * * * is adequate consideration" for purposes of satisfying the relevant environmental laws. Pub. L. No. 101-121, §318(b)(6)(A), 103 Stat. 701, 747 (1989).

Far from holding that case-specific legislation satisfies the separation of powers, this Court expressly declined to reach the issue. The Ninth Circuit had "held that [the statute] was unconstitutional under *Klein* because it directed decisions in pending cases without amending any law." 503 U.S. at 441. This Court concluded, however, that the statute "*did* amend applicable law." *Ibid.* The Court thus observed that it "need not consider whether [the court of appeals'] reading of *Klein* is correct." *Ibid.* Because the Ninth Circuit's decision was flawed even on

its own terms, the Court reversed that narrow ruling without "address[ing] any broad question of Article III jurisprudence." *Ibid.*

The Court noted the argument, made in an amicus brief, that "even a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases." 503 U.S. at 441. But "[t]his alternative theory was neither raised below nor squarely considered by the Court of Appeals, nor was it advanced by respondents in this Court." *Ibid.* The Court therefore "decline[d] to address it." *Ibid.* *Robertson* thus did not hold that statutes purporting to change the law solely for a single pending case are constitutional. It expressly declined to reach that issue.

As the Court explained, moreover, the statute in question did not even present that issue. The plaintiffs complained that the statute "made reference to pending cases identified by name and caption number." 503 U.S. at 440. But the Court responded that "[t]he reference to [the cases] * * * served only to identify the five 'statutory requirements that are the basis for' those cases." *Ibid.* In other words, the statute provided that compliance with the new rules was sufficient to comply with *the five statutory requirements at issue in* those two cases, not that the statute *applied* only to those two cases. See Pub. L. No. 101-121, §318(b)(6)(A), 103 Stat. at 747 (providing that "management of areas according to [the new rules] * * * is adequate consideration for the purpose of meeting the statutory requirements that are the basis for [the two cases identified by docket number]").

The statute thus would have applied equally to *any other lawsuit by any other plaintiff* challenging the logging on the basis of those five statutory provisions. That

is the opposite of the statute here, which expressly disclaims any effect on "any other action * * * in any [other] proceedings." 22 U.S.C. §8772(c)(1).

Finally, although not the basis for the Court's decision, *Robertson* fell squarely within the traditional *Wheeling Bridge* exceptions. The case involved suits to enjoin logging on federal lands under federal environmental statutes. It thus involved prospective relief against the government concerning traditional public rights—not tort claims between other parties seeking billions of dollars of money damages.

3. Nor does *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), support §8772's constitutionality. That case involved a statute purporting to revive securities lawsuits dismissed under this Court's statute-of-limitations decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991). The statute did not target any particular case. It applied generally to "[a]ny private civil action" dismissed under *Lampf*. Pub. L. No. 102-242, sec. 476, §27A(b), 105 Stat. 2236, 2387 (1991).

This Court held that the statute violated the separation of powers by "requir[ing] federal courts to reopen final judgments." *Plaut*, 514 U.S. at 240. Article III, the Court held, grants the judiciary "the power, not merely to rule on cases, but to *decide* them." *Id.* at 218-219. That violation, the Court added, did not depend on how many judgments Congress reopened: The violation "consists *not* of the Legislature's acting in a particularized and hence * * * nonlegislative fashion; but rather of the Legislature's nullifying prior, authoritative judicial action." *Id.* at 239 (footnote omitted). "It makes no difference whatever to that separation-of-powers violation that it is in gross rather than particularized * * * " *Ibid.*

That holding does not support what Congress did here. The statute in *Plaut* was unconstitutional because it reopened final judgments. For "*that* separation-of-powers violation," it made no difference whether the violation was "in gross rather than particularized." 514 U.S. at 239 (emphasis added). That does not mean the specificity of a statute is irrelevant when Congress tries to legislate the outcome of a specific pending case.

In a footnote, the Court deemed it "questionable" whether "there is something wrong with particularized legislative action," noting that "[e]ven laws that impose a duty or liability upon a single individual or firm are not on that account invalid." 514 U.S. at 239 n.9. But §8772 does not merely impose a duty or liability upon a "single individual or firm." It changes the law for a single *case*. The core judicial function is to decide particular cases or controversies. When Congress manipulates the law governing a single pending *case*, it infringes that power.

The tradition of "[p]rivate bills in Congress" that *Plaut* identified only underscores the contrast between §8772 and historical practices. 514 U.S. at 239 n.9. The enactment of a bill for private relief did not change the law for a specific pending *case*. Of the 563 private bills Congress enacted between 1789 and 1819, not a *single one* purported to change the law for a pending judicial proceeding. See 6 Stat. 1-235 (1789-1819). Only a handful referred to judicial proceedings at all, and those simply paid or indemnified judgments,[7] or released the

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[7] See Act of Apr. 14, 1802, ch. 27, 6 Stat. 47 (paying judgment against officer); Act of Jan. 31, 1805, ch. 12, 6 Stat. 56 (paying admiralty judgment); Act of Jan. 17, 1807, ch. 4, 6 Stat. 63 (paying admiralty judgment); Act of Feb. 2, 1813, ch. 19, 6 Stat. 116 (paying judgment against officer); Act of Apr. 26, 1816, ch. 90, 6 Stat. 166 (paying interest on award); Act of Apr. 29, 1816, ch. 157, 6 Stat. 175 (indemnifying

government's own claims.[8]

Private bills, moreover, invariably involved matters such as payment of compensation for government service, payment of claims against the government, forgiveness of debts owed to the government, or disposition of government property. See, *e.g.*, Act of Sept. 29, 1789, ch. 26, 6 Stat. 1 (paying compensation for government service); Act of July 1, 1790, ch. 24, 6 Stat. 3 (forgiving penalty for neglecting to transport the mail). Those are paradigmatic *public rights*. If Congress could enact a bill to alter the outcome of a pending case between other parties, it surely would have done so. It did not.

Plaut also referred to this Court's ruling in *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), that "Congress may legislate 'a legitimate class of one.'" 514 U.S. at 239 n.9. *Nixon* upheld a statute providing for custody of President Nixon's tape recordings. 433 U.S. at 433-434, 471-472. The statute did not purport to change the tapes' status solely for one pending *case*.

Nor does the mere existence of the Bill of Attainder Clause imply that any legislation not running afoul of that clause is automatically constitutional. *Plaut*, 514 U.S. at 239 n.9 (citing U.S. Const. art. I, § 9). The Bill of Attainder Clause targeted one particularly notorious

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parties); Resolution No. 2 of Feb. 15, 1816, 6 Stat. 180 (indemnifying parties); Act of Apr. 11, 1818, ch. 50, 6 Stat. 206 (paying judgments); Act of Apr. 18, 1818, ch. 72, 6 Stat. 208 (paying judgment); cf. Act of Mar. 2, 1819, ch. 53, 6 Stat. 228 (consenting to bill in equity against the government).

[8] See Act of Apr. 29, 1802, ch. 34, 6 Stat. 47 (discontinuing suit brought by government); Act of Apr. 20, 1816, ch. 59, 6 Stat. 162 (releasing defendant from judgment obtained by government); Act of Apr. 27, 1816, ch. 108, 6 Stat. 169 (conditionally releasing claims brought by government).

abuse, but it reflected broader separation-of-powers concerns. See *United States* v. *Brown*, 381 U.S. 437, 442 (1965) (clause was "an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature"); 3 Joseph Story, *Commentaries on the Constitution of the United States* §1338, at 210 (1833); *Leveller Manifestoes*, *supra*, at 266. It cannot be that, by prohibiting that one abuse, the Constitution licenses Congress to exercise whatever other judicial powers it wants so long as it does not actually attaint anyone. Congress obviously could not appoint a subcommittee to adjudicate common-law breach of contract or personal injury suits between private parties so long as it operated only a civil and not a criminal docket.

Plaut's footnote thus stands only for the modest and uncontroversial proposition that particularized legislation *in general* is "not on that account invalid." 514 U.S. at 239 n.9. It does not mean that statutes changing the law solely for a specific pending *case* are constitutional—much less when Congress seeks to force one party to pay other parties billions of dollars for past injuries. Nothing in *Plaut* or any other decision of this Court supports such extraordinary legislation.

II. Section 8772 Effectively Dictates The Outcome Of A Specific Pending Case

Section 8772 also suffers from a further constitutional defect. It does not merely purport to change the law for one case. It also effectively determined the case's outcome. Under Article III, courts—not Congress—decide individual cases. Congress usurps that function when, in the guise of legislating, it enacts a case-specific rule that effectively dictates the outcome.

A. Congress May Not Direct the Outcome of Specific Cases

1. Over a century ago, *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), held that Congress may not dictate the outcome of a pending case. In that case, Congress had enacted a statute designed to prevent pardoned Confederate sympathizers from prevailing in suits against the government. An earlier statute had authorized the Secretary of the Treasury to seize and sell abandoned or captured property during the war. Act of Mar. 3, 1863, ch. 120, §§1-2, 12 Stat. 820, 820. The owner could sue in the court of claims after the war to recover the proceeds, but had to prove his loyalty to the United States. *Id.* §3.

In *United States* v. *Padelford*, 76 U.S. (9 Wall.) 531 (1870), this Court held that acts of disloyalty would be disregarded if the claimant had been pardoned. *Id.* at 541-543. A few months later, Congress included a rider in an appropriations bill stating that a pardon was not "admissible in evidence on the part of any claimant." Act of July 12, 1870, ch. 251, 16 Stat. 230, 235. To the contrary, if the pardon recited acts of disloyalty that the recipient had not denied upon being pardoned, the statute required that it be deemed "conclusive evidence that such person did take part in and give aid and comfort to the late rebellion." *Ibid.*

This Court held the statute unconstitutional. The provision purported to dictate the outcome of pending cases "founded solely on the application of a rule of decision * * * prescribed by Congress." *Klein*, 80 U.S. (13 Wall.) at 146. That was impermissible: "[T]he legislature," the Court held, may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Ibid.* By seeking to dictate the outcome in

pending cases, Congress had "passed the limit which separates the legislative from the judicial power." *Id.* at 147.

2. *Klein*'s holding was no innovation. Legislative attempts to direct the outcome of pending cases have long been deemed as objectionable as efforts to reopen final judgments. The chronicles of legislative abuses leading up to the Constitution's adoption are replete with examples. See pp. 29-30, *supra* (describing special legislation passed to "modif[y] the position of named parties before the law" as well as actual legislative trial of civil and criminal cases).

Early state courts condemned such legislation. In *Holden* v. *James*, 11 Mass. (10 Tyng) 396 (1814), the court held that "to prescribe to the courts of justice the judgment which the laws of the land would require them to render on the facts disclosed in this case * * * would be an exercise of judicial power by the legislative department." *Id.* at 402. And in *O'Conner* v. *Warner*, 4 Watts & Serg. 223 (Pa. 1842), the court held that "a legislative direction to perform a judicial function in a particular way, would be a direct violation of the constitution." *Id.* at 227; see also *Reiser*, 39 Pa. at 145 (refusing to decide case "according to the direction of the legislature").

Cooley wrote that the separation of powers prohibits legislatures, not merely from "setting aside * * * judgments" or "compelling [courts] to grant new trials," but also from interfering with pending cases by "directing what particular steps shall be taken in the progress of a judicial inquiry." Cooley, *supra*, at 95. Sutherland agreed: The legislature may not "interfere by subsequent acts with final judgments of the courts," nor may it "direct how *existing* cases or controversies shall be decided." J.G. Sutherland, *Statutes and Statutory Construction* 9-10 (1891) (emphasis added). The separation

of powers thus prohibits Congress from directing the outcome of a case—especially for one case and one case alone.

B. Section 8772 Effectively Dictated the Outcome of This Case

Section 8772 violates those principles. It effectively directed the court to transfer almost $2 billion in assets from one party to others in a private monetary dispute. And while the statute formally conditioned that outcome on two judicial "determinations," both were make-weights. The statute is thus even more constitutionally offensive than the one this Court struck down in *Klein*, which at least had the virtue of establishing a rule for a class of cases. Section 8772 effectively directs the outcome in a single pending case.

1. Section 8772 states its objective clearly: "to *ensure* that Iran is held accountable for paying the judgments." 22 U.S.C. §8772(a)(2) (emphasis added). That statutory text leaves nothing to the imagination about Congress's intent.

If any doubt remained, the legislative record erases it. To avoid any "ambiguity about [the bill's] intent," Senator Menendez—the act's sponsor—stated on the Senate floor that he "wanted to be sure that there was understanding on the record that Iran * * * *should not be able to avoid having its assets attached.*" 158 Cong. Rec. S3321 (May 21, 2012) (emphasis added). He reiterated that objective in multiple press releases. See *Menendez Hails Banking Committee Passage of Iran Sanctions Legislation* (Feb. 2, 2012) (legislation "makes it so that [plaintiffs] *will be able to attach* two billion in Iranian Central Bank assets being held at a New York Bank" (emphasis added)); *ibid.* (bill "will finally allow [plaintiffs] to enforce the judgment against Iran using Iranian assets

being held at Citibank in NY"); *Menendez Hails Passage of Iran Sanctions Legislation* (May 21, 2012) (bill "[m]akes available for attachment frozen assets of Iran to pay judgments").

The Senate Banking Committee Chairman concurred: The legislation "enable[d] attachment of assets in which the government of Iran has an interest, to satisfy certain terror-related judgments." 158 Cong. Rec. S3318 (May 21, 2012). The House sponsor similarly explained that the statute "change[d] a specific part of Federal law to allow assets seized from the Iranian Government to be allocated to [plaintiffs]." 158 Cong. Rec. H5569 (Aug. 1, 2012). "It is time that Iran is held accountable," he stated, and the statute would "offer [plaintiffs] the justice that they have long been denied." *Ibid.*

Indeed, §8772 was drafted by one of plaintiffs' counsel and pushed through Congress by a lobbyist working with one of their law firms. See Julie Triedman, *Can U.S. Lawyers Make Iran Pay for 1983 Bombing?*, Am. Law., Oct. 28, 2013. Legislation drafted by one party that directs the court to grant victory to that party in a pending case might be unexceptional in a country lacking commitment to the rule of law. But it defies our Nation's settled traditions.

2. While §8772 purports to require two judicial "determinations," both are makeweights that belittle the judicial role. Plaintiffs may execute if the court determines that (1) "Iran holds equitable title to, or the beneficial interest in, the assets"; and (2) "no other person possesses a constitutionally protected interest in the assets." 22 U.S.C. §8772(a)(2). The statute thus required the court to find only that the assets were traceable to Iran rather than someone else. It effectively declared that Iran loses so long as only Iran loses. If Article III pre-

vents Congress from "say[ing] that a court must award Jones $35,000," *Lindh*, 96 F.3d at 872, it surely prevents Congress from awarding $35,000 conditioned only on a finding that the $35,000 belongs to the defendant and not someone else.

The findings, moreover, were foregone conclusions. There was never any dispute that Bank Markazi had a "beneficial interest" in the assets. Bank Markazi has acknowledged that fact throughout this litigation—that is why it has been litigating the case. See Pet. App. 2a ("Bank Markazi concedes that * * * it has at least a 'beneficial interest' in the assets at issue."); *id.* at 113a (cataloguing admissions). Indeed, plaintiffs first learned of the assets in June 2008 when the Treasury Department's Office of Foreign Assets Control advised them that an Iranian government entity had an interest in the assets. See Triedman, *supra*; C.A. App. 1386. And by the time Congress enacted §8772, the President had blocked the assets precisely because Bank Markazi had an "interest[] in [the] property." Executive Order No. 13,599, 77 Fed. Reg. 6659, 6659 (Feb. 5, 2012).

Similarly, there was never any genuine dispute over whether any *other* person had a cognizable interest in the assets. By the time Congress enacted §8772, Citibank had filed its interpleader complaint disclaiming any interest. See Pet. App. 54a; C.A. App. 1362. The only remaining candidates were UBAE and Clearstream. But §8772 *expressly excluded* their interests. In determining whether another party holds "equitable title to, or a beneficial interest in, the assets," the statute directs the court to *ignore* any "custodial interest of a foreign securities intermediary or a related intermediary that holds the assets abroad for the benefit of Iran." 22 U.S.C. §8772(a)(2)(A). The effect (and obvious purpose) of that

provision was to exclude the interests of UBAE and Clearstream—the only other parties with arguable claims. Congress thus knew full well what impact §8772 would have on the outcome of this case.[9]

3. The Second Circuit acknowledged Bank Markazi's argument that §8772 "effectively compels only one possible outcome, as Iran's beneficial interest in the assets had been established by the time Congress enacted §8772." Pet. App. 10a. Far from rejecting that contention, the Second Circuit embraced it. "[I]t would be unusual," the court declared, "for there to be more than one likely outcome when Congress changes the law for a pending case with a developed factual record." *Ibid.* The court thus conceded that "there may be little functional difference between §8772 and a hypothetical statute directing the courts to find that the assets at issue in this case are subject to attachment under existing law." *Ibid.* But the court upheld the statute nonetheless. Congress, it held, may change the law for a pending case "even when the result under the revised law is clear." *Id.* at 8a.[10]

The court of appeals reasoned that, under *Robertson*, Congress can direct the outcome of a case so long as it

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[9] Moreover, to the extent a third party had a "constitutionally protected interest in the assets," 22 U.S.C. §8772(a)(2), a court would be required to consider the claim even without a statutory requirement. The statute's superfluous exception for constitutional claims underscores how little §8772 actually left to judicial determination.

[10] The *district court* asserted that the statute left "plenty for [it] to adjudicate." Pet. App. 115a. But that claim is hard to square with the court's analysis, which occupied only two paragraphs and largely recited various admissions about the assets' status. See *id.* at 111a-113a. In any event, the *court of appeals* did not rely on that assertion, much less agree with it. And this Court reviews the court of appeals' judgment.

"changes the law applicable to th[e] case" rather than "compel[ling] judicial findings under old law." Pet. App. 9a. But that holding misreads *Robertson*. See pp. 37-38, *supra*. The *court of appeals* in *Robertson* held that the constitutionality of a statute turned on whether Congress "directed decisions in pending cases without amending any law." 503 U.S. at 441. But this Court *refused to consider* "whether this reading of *Klein* is correct." *Ibid.* Moreover, the statute in *Robertson* did not dictate the outcome. It "expressly reserved judgment upon 'the legal and factual adequacy' of the administrative documents" and "expressly provided for *judicial* determination of the lawfulness of * * * sales." *Id.* at 438-439.

This Court's later cases do not adopt that standard either. In *Plaut*, this Court mentioned *Klein* in three sentences of dicta explaining why *Klein* involved a different separation-of-powers question. 514 U.S. at 218. The Court stated that "later decisions have made clear that [*Klein*'s] prohibition does not take hold when Congress 'amend[s] applicable law.'" *Ibid.* But the only authority the Court cited for that point was the passage in *Robertson* where the Court *declined to address* that issue. *Ibid.* (citing 503 U.S. at 441). *Plaut* cannot fairly be read as deciding this question.

Nor can *Miller* v. *French*, 530 U.S. 327 (2000). That case involved a generally applicable statute that automatically stayed prison reform orders if the court did not decide a motion to terminate the order within 30 days. *Id.* at 333-334. The prisoners challenging the statute "concede[d]" that the provision would be valid under *Klein* if it amended applicable law, and the Court—accepting that concession—held that the statute did just that. *Id.* at 349 (citing *Plaut*, 514 U.S. at 218).

In short, none of this Court's cases holds that a statute that compels the outcome in a case—especially a single case specifically identified in statutory text—is constitutional so long as the statute amends the law. *Klein* certainly did not turn on any such formalism. Although the Court struck down the statute there because it prescribed "rules of decision" for pending cases, 80 U.S. (13 Wall.) at 146, the Court never suggested it was using that term in contradistinction to a statutory amendment. And the Court never explained what made the legislation at issue anything other than what it purported to be: a new law. Act of July 12, 1870, ch. 251, 16 Stat. at 235.

The distinction also makes no sense. Practically any congressional enactment can be described as "amending the law" in some sense. The distinction is thus at worst incoherent and at best a drafting rule that requires Congress to dictate outcomes by drafting statutes a particular way. The Framers intended the separation of powers to be a meaningful bulwark against legislative interference—not a rule of draftsmanship.

III. Bank Markazi's Sovereign Status Is Irrelevant

Seeking to avoid this Court's review, plaintiffs and the government previously argued that, whatever the separation-of-powers rule for other cases, this case is different because it involves a foreign sovereign. Br. in Opp. 23-25; U.S. Cert. Br. 18-19. That argument is both irrelevant and wrong.

A. Bank Markazi's sovereign status played no role in the court of appeals' decision below. That court decided the case based on general separation-of-powers principles, not a special rule for foreign sovereigns. See Pet. App. 7a-10a. This Court thus need not consider Bank Markazi's sovereign status. Any special rule for foreign

sovereigns, if properly preserved, would at most be an issue for remand.

This Court, moreover, is "'a court of review, not of first view.'" *Nautilus, Inc.* v. *Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2131 (2014). Neither the court below nor any other court of appeals has addressed whether Article III applies differently to claims against foreign sovereigns. This Court should follow its usual practice and refrain from pronouncing on that issue without the considered views of the lower courts.

B. In any event, Bank Markazi's sovereign status in no way mitigates the constitutional violation. Plaintiffs and the government contend that ordinary separation-of-powers principles should not apply because, in the past, *sovereign immunity* was decided on a case-by-case basis by the Executive Branch. Br. in Opp. 23-25; U.S. Cert. Br. 18-19. That argument fails for multiple reasons.

1. For one thing, §8772 goes far beyond revoking sovereign immunity. The statute preempts *state property law* under the Uniform Commercial Code as well as the federal substantive law of juridical status.

As explained above, New York law ordinarily would have precluded seizure of the assets at issue to satisfy Bank Markazi's obligations. See pp. 26-27, *supra*. Plaintiffs were permitted to execute only because §8772 "preempt[ed] any inconsistent provision of State law." 22 U.S.C. §8772(a)(1). That was the statute's avowed purpose: to "preempt[] Uniform Commercial Code provisions that insulate indirectly held assets from judgment creditors." Triedman, *supra*. Section 8772 thus altered *substantive* state property law for this case alone.

Likewise, prior to §8772's enactment, Bank Markazi had at least a reasonable argument that *Bancec* and the

Treaty of Amity prohibited attachment of its assets to satisfy judgments against the Iranian government. Compare pp. 27-28, *supra*, with Pet. App. 6a-7a. But §8772 changed that law too, creating a unique veil-piercing rule that applies solely to this one case. See 22 U.S.C. §8772(a)(1)(C), (d)(3). The statute thus altered *substantive* federal law—not just immunity. The Executive Branch's former authority to make case-by-case *immunity* decisions hardly licenses Congress to give case-by-case directions to federal courts over the governing *substantive* law.

The public rights doctrine might affect Congress's authority over claims against the *federal government*. The government's plenary power to expend its *own* funds, divest its *own* property, or waive its *own* immunity often includes power to dispense with Article III's requirements for claims concerning those functions. See *Stern*, 131 S. Ct. at 2612. But Congress cannot dispense with Article III's requirements for private tort claims against *other, non-consenting defendants*—whether publicly owned or private. See *Crowell* v. *Benson*, 285 U.S. 22, 50-51 (1932) (public rights doctrine traditionally inapplicable to disputes over "liability of one individual to another"); *Stern*, 131 S. Ct. at 2615 (doctrine inapplicable to "common law cause of action * * * [that] neither derives from nor depends upon any agency regulatory regime").

Whatever the scope of Congress's authority to revoke sovereign immunity, §8772 goes far beyond it by modifying substantive law—including state property law—for a single pending case between other parties. That is a domain that Article III reserves to the courts.

2. In any event, there is no reason to treat sovereign immunity differently. Sovereign immunity was formerly decided on a case-by-case basis by the Executive Branch.

See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486-488 (1983). But that does not prove that *Congress* can pass a statute revoking immunity for a single case. That is especially true now that Congress has replaced the former immunity regime with judicial determinations under defined statutory standards. One consequence is that Article III limits Congress's authority to alter those standards in a pending case. Congress can shift case-by-case immunity determinations from the Executive to the courts; it cannot shift those case-by-case determinations to itself.

The only other court of appeals to consider this issue expressed grave reservations. After detainees from the 1979 Iran hostage crisis tried to sue Iran, Congress enacted a new exception to sovereign immunity that applied solely to that case. See Pub. L. No. 107-77, §626(c), 115 Stat. 748, 803 (2001) (adding the words "or the act is related to Case Number 1:00CV03110(ESG) in the United States District Court for the District of Columbia" to existing immunity exception) (codified as amended at 28 U.S.C. §1605A(a)(2)(B)). The D.C. Circuit recognized that "it is open to question whether Congress may dictate the outcome of a particular judicial proceeding" and reserved judgment as to "whether the amendments, relating as they did specifically to a pending action, violated separation-of-powers principles by impermissibly directing the result of pending litigation." *Roeder* v. *Islamic Republic of Iran*, 333 F.3d 228, 237 & n.5 (D.C. Cir. 2003), cert. denied, 542 U.S. 915 (2004).

If Congress wanted to compensate these plaintiffs, there were any number of alternatives. Congress could have paid the claims out of public funds, as it has done in the past. See, *e.g.*, Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §2002(b)(2),

114 Stat. 1464, 1543. Or the political branches could have sought to negotiate compensation through diplomatic discussions. See *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943) (recognizing that the "national interest will be better served in such cases if the wrongs to suitors * * * are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings").

What Congress could not do is amend the law solely for this one case to ensure that plaintiffs would prevail. That is what § 8772 does. The statute is inconsistent with both the separation of powers and the rule of law. It cannot be upheld.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX

RELEVANT CONSTITUTIONAL, STATUTORY, AND TREATY PROVISIONS

1. Article III of the United States Constitution provides:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

2. Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214, 1258, as codified at 22 U.S.C. § 8772, provides:

§ 8772. Interests in certain financial assets of Iran

(a) Interests in blocked assets

(1) In general

Subject to paragraph (2), notwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law, a financial asset that is—

(A) held in the United States for a foreign securities intermediary doing business in the United States;

(B) a blocked asset (whether or not subsequently unblocked) that is property described in subsection (b); and

(C) equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran or any agency or instrumentality of that Government, that such foreign securities intermediary or a related intermediary holds abroad,

shall be subject to execution or attachment in aid of execution in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, or hostage-taking, or the provision of material support or resources for such an act.

(2) Court determination required

In order to ensure that Iran is held accountable for paying the judgments described in paragraph (1) and in furtherance of the broader goals of this Act to sanction

Iran, prior to an award turning over any asset pursuant to execution or attachment in aid of execution with respect to any judgments against Iran described in paragraph (1), the court shall determine whether Iran holds equitable title to, or the beneficial interest in, the assets described in subsection (b) and that no other person possesses a constitutionally protected interest in the assets described in subsection (b) under the Fifth Amendment to the Constitution of the United States. To the extent the court determines that a person other than Iran holds—

(A) equitable title to, or a beneficial interest in, the assets described in subsection (b) (excluding a custodial interest of a foreign securities intermediary or a related intermediary that holds the assets abroad for the benefit of Iran); or

(B) a constitutionally protected interest in the assets described in subsection (b),

such assets shall be available only for execution or attachment in aid of execution to the extent of Iran's equitable title or beneficial interest therein and to the extent such execution or attachment does not infringe upon such constitutionally protected interest.

(b) Financial assets described

The financial assets described in this section are the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG), that were restrained by restraining notices and levies secured by the plaintiffs in those proceedings, as modified by court order dated June 27, 2008, and extended by court orders dated June 23, 2009, May 10, 2010,

and June 11, 2010, so long as such assets remain restrained by court order.

(c) Rules of construction

Nothing in this section shall be construed—

(1) to affect the availability, or lack thereof, of a right to satisfy a judgment in any other action against a terrorist party in any proceedings other than proceedings referred to in subsection (b); or

(2) to apply to assets other than the assets described in subsection (b), or to preempt State law, including the Uniform Commercial Code, except as expressly provided in subsection (a)(1).

(d) Definitions

In this section:

(1) Blocked asset

The term "blocked asset"—

(A) means any asset seized or frozen by the United States under section 5(b) of the Title 50, Appendix or under section 1701 or 1702 of Title 50; and

(B) does not include property that—

(i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of the license has been specifically required by a provision of law other than the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) or the United Nations Participation Act of 1945 (22 U.S.C. 287 *et seq.*); or

(ii) is property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention

on Consular Relations, or that enjoys equivalent privileges and immunities under the laws of the United States, and is being used exclusively for diplomatic or consular purposes.

(2) Financial asset; securities intermediary

The terms "financial asset" and "securities intermediary" have the meanings given those terms in the Uniform Commercial Code, but the former includes cash.

(3) Iran

The term "Iran" means the Government of Iran, including the central bank or monetary authority of that Government and any agency or instrumentality of that Government.

(4) Person

(A) In general

The term "person" means an individual or entity.

(B) Entity

The term "entity" means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization.

(5) Terrorist party

The term "terrorist party" has the meaning given that term in section 201(d) of the Terrorism Risk Insurance Act of 2002 (28 U.S.C. 1610 note).

(6) United States

The term "United States" includes all territory and waters, continental, or insular, subject to the jurisdiction of the United States.

3. The Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, as amended and codified at 28 U.S.C. §§ 1602 *et seq.*, provides:

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state

may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a

discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo

against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in

any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) Repealed.

(g) LIMITATION ON DISCOVERY.—

(1) IN GENERAL.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security opera-

tion, related to the incident that gave rise to the cause of action.

(2) SUNSET.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) EVALUATION OF EVIDENCE.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) BAR ON MOTIONS TO DISMISS.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) CONSTRUCTION.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL.—

(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this

section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) LIMITATIONS.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) SPECIAL MASTERS.—

(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) PROPERTY DISPOSITION.—

(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) DEFINITIONS.—For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other lia-

bility or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of

section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign

Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) WAIVER.—The President may waive any provision of paragraph (1) in the interest of national security.

(g) PROPERTY IN CERTAIN ACTIONS.—

(1) IN GENERAL.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which para-

graph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) THIRD-PARTY JOINT PROPERTY HOLDERS.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwith-

standing any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

4. Section 201 of the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322, 2337, as amended and reproduced at 28 U.S.C. § 1610 note, provides:

(a) IN GENERAL.—Notwithstanding any other provision of law, and except as provided in subsection (b) [of this note], in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605A or 1605(a)(7) (as such section was in effect on January 27, 2008) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

(b) PRESIDENTIAL WAIVER.—

(1) IN GENERAL.—Subject to paragraph (2), upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive the requirements of subsection (a) [of this note] in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(2) EXCEPTION.—A waiver under this subsection shall not apply to—

(A) property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations that has been used by the United States for any nondiplomatic purpose (in-

cluding use as rental property), or the proceeds of such use; or

(B) the proceeds of any sale or transfer for value to a third party of any asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(d) DEFINITIONS.—In this section [this note] the following definitions shall apply:

(1) ACT OF TERRORISM.—The term "act of terrorism" means—

(A) any act or event certified under section 102(1) [Pub. L. 107-297, Title I, § 102(1), Nov. 26, 2002, 116 Stat. 2323, which is set out in a note under 15 U.S.C.A. § 6701]; or

(B) to the extent not covered by subparagraph (A), any terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(iii))).

(2) BLOCKED ASSET.—The term "blocked asset" means—

(A) any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702); and

(B) does not include property that—

(i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of such license has been specifically required by statute

other than the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) or the United Nations Participation Act of 1945 (22 U.S.C. 287 *et seq.*); or

(ii) in the case of property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges and immunities under the law of the United States, is being used exclusively for diplomatic or consular purposes.

(3) CERTAIN PROPERTY.—The term "property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations" and the term "asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations" mean any property or asset, respectively, the attachment in aid of execution or execution of which would result in a violation of an obligation of the United States under the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, as the case may be.

(4) TERRORIST PARTY.—The term "terrorist party" means a terrorist, a terrorist organization (as defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi))), or a foreign state designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371).

5. The Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899, provides in relevant part:

The United States of America and Iran, desirous of emphasizing the friendly relations which have long prevailed between their peoples, of reaffirming the high principles in the regulation of human affairs to which they are committed, of encouraging mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and of regulating consular relations, have resolved to conclude, on the basis of reciprocal equality of treatment, a Treaty of Amity, Economic Relations, and Consular Rights, and have appointed as their Plenipotentiaries:

The President of the United States of America:

Mr. Selden Chapin, Ambassador Extraordinary and Plenipotentiary of the United States of America at Tehran;

and

His Imperial Majesty, the Shah of Iran:

His Excellency Mr. Mostafa Samiy, Under Secretary of the Ministry of Foreign Affairs;

Who, having communicated to each other their full powers found to be in due form, have agreed upon the following articles:

* * * * *

ARTICLE III

1. Companies constituted under the applicable laws and regulations of either High Contracting Party shall have their juridical status recognized within the territories of the other High Contracting Party. It is understood, however, that recognition of juridical status does not of itself confer rights upon companies to engage in

the activities for which they are organized. As used in the present Treaty, "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit.

2. Nationals and companies of either High Contracting Party shall have freedom of access to the courts of justice and administrative agencies within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights, to the end that prompt and impartial justice be done. Such access shall be allowed, in any event, upon terms no less favorable than those applicable to nationals and companies of such other High Contracting Party or of any third country. It is understood that companies not engaged in activities within the country shall enjoy the right of such access without any requirement of registration or domestication.

3. The private settlement of disputes of a civil nature, involving nationals and companies of either High Contracting Party, shall not be discouraged within the territories of the other High Contracting Party; and, in cases of such settlement by arbitration, neither the alienage of the arbitrators nor the foreign situs of the arbitration proceedings shall of themselves be a bar to the enforceability of awards duly resulting therefrom.

ARTICLE IV

1. Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded ef-

fective means of enforcement, in conformity with the applicable laws.

2. Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

3. The dwellings, offices, warehouses, factories and other premises of nationals and companies of either High Contracting Party located within the territories of the other High Contracting Party shall not be subject to entry or molestation without just cause. Official searches and examinations of such premises and their contents, shall be made only according to law and with careful regard for the convenience of the occupants and the conduct of business.

4. Enterprises which nationals and companies of either High Contracting Party are permitted to establish or acquire, within the territories of the other High Contracting Party, shall be permitted freely to conduct their activities therein, upon terms no less favorable than other enterprises of whatever nationality engaged in similar activities. Such nationals and companies shall enjoy the right to continued control and management of such enterprises; to engage attorneys, agents, accountants and other technical experts, executive personnel, interpreters and other specialized employees of their choice; and to do

all other things necessary or incidental to the effective conduct of their affairs.

ARTICLE V

1. Nationals and companies of either High Contracting Party shall be permitted, within the territories of the other High Contracting Party: (a) to lease, for suitable periods of time, real property needed for their residence or for the conduct of activities pursuant to the present Treaty; (b) to purchase or otherwise acquire personal property of all kinds; and (c) to dispose of property of all kinds by sale, testament or otherwise. The treatment accorded in these respects shall in no event be less favorable than that accorded nationals and companies of any third country.

2. Upon compliance with the applicable laws and regulations respecting registration and other formalities, nationals and companies of either High Contracting Party shall be accorded within the territories of the other High Contracting Party effective protection in the exclusive use of inventions, trade marks and trade names.

* * * * *

ARTICLE XI

1. Each High Contracting Party undertakes (a) that enterprises owned or controlled by its Government, and that monopolies or agencies granted exclusive or special privileges within its territories, shall make their purchases and sales involving either imports or exports affecting the commerce of the other High Contracting Party solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale; and (b) that the nationals, companies and commerce of such other High Contracting Party shall be afforded ade-

quate opportunity, in accordance with customary business practice, to compete for participation in such purchases and sales.

2. Each High Contracting Party shall accord to the nationals, companies and commerce of the other High Contracting Party fair and equitable treatment, as compared with that accorded to the nationals, companies and commerce of any third country, with respect to: (a) the governmental purchase of supplies, (b) the awarding of government contracts, and (c) the sale of any service sold by the Government or by any monopoly or agency granted exclusive or special privileges.

3. The High Contracting Parties recognize that conditions of competitive equality should be maintained in situations in which publicly owned or controlled trading or manufacturing enterprises of either High Contracting Party engage in competition, within the territories thereof, with privately owned and controlled enterprises of nationals and companies of the other High Contracting Party. Accordingly, such private enterprises shall, in such situations, be entitled to the benefit of any special advantages of an economic nature accorded such public enterprises, whether in the nature of subsidies, tax exemptions or otherwise. The foregoing rule shall not apply, however, to special advantages given in connection with: (a) manufacturing goods for government use, or supplying goods and services to the Government for government use; or (b) supplying at prices substantially below competitive prices, the needs of particular population groups for essential goods and services not otherwise practically obtainable by such groups.

4. No enterprise of either High Contracting Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned

or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

* * * * *

ARTICLE XXI

1. Each High Contracting Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other High Contracting Party may make with respect to any matter affecting the operation of the present Treaty.

2. Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.

* * * * *

6. Article 8 of the Uniform Commercial Code provides in relevant part:

* * * * *

§ 8-102. Definitions.

(a) In this Article:

* * * * *

(14) "Securities intermediary" means:

(i) a clearing corporation; or

(ii) a person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity.

* * * * *

(17) "Security entitlement" means the rights and property interest of an entitlement holder with respect to a financial asset specified in Part 5.

* * * * *

§ 8-112. Creditor's Legal Process.

(a) The interest of a debtor in a certificated security may be reached by a creditor only by actual seizure of the security certificate by the officer making the attachment or levy, except as otherwise provided in subsection (d). However, a certificated security for which the certificate has been surrendered to the issuer may be reached by a creditor by legal process upon the issuer.

(b) The interest of a debtor in an uncertificated security may be reached by a creditor only by legal process upon the issuer at its chief executive office in the United States, except as otherwise provided in subsection (d).

(c) The interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon

the securities intermediary with whom the debtor's securities account is maintained, except as otherwise provided in subsection (d).

(d) The interest of a debtor in a certificated security for which the certificate is in the possession of a secured party, or in an uncertificated security registered in the name of a secured party, or a security entitlement maintained in the name of a secured party, may be reached by a creditor by legal process upon the secured party.

(e) A creditor whose debtor is the owner of a certificated security, uncertificated security, or security entitlement is entitled to aid from a court of competent jurisdiction, by injunction or otherwise, in reaching the certificated security, uncertificated security, or security entitlement or in satisfying the claim by means allowed at law or in equity in regard to property that cannot readily be reached by other legal process.

* * * * *

[OFFICIAL COMMENT]

3. Subsection (c) provides that a security entitlement can be reached only by legal process upon the debtor's security intermediary. Process is effective only if directed to the debtor's own security intermediary. If Debtor holds securities through Broker, and Broker in turn holds through Clearing Corporation, Debtor's property interest is a security entitlement against Broker. Accordingly, Debtor's creditor cannot reach Debtor's interest by legal process directed to the Clearing Corporation. See also Section 8-115.

* * * * *

§ 8-504. Duty of Securities Intermediary to Maintain Financial Asset.

(a) A securities intermediary shall promptly obtain and thereafter maintain a financial asset in a quantity corresponding to the aggregate of all security entitlements it has established in favor of its entitlement holders with respect to that financial asset. The securities intermediary may maintain those financial assets directly or through one or more other securities intermediaries.

(b) Except to the extent otherwise agreed by its entitlement holder, a securities intermediary may not grant any security interests in a financial asset it is obligated to maintain pursuant to subsection (a).

(c) A securities intermediary satisfies the duty in subsection (a) if:

(1) the securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) in the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to obtain and maintain the financial asset.

(d) This section does not apply to a clearing corporation that is itself the obligor of an option or similar obligation to which its entitlement holders have security entitlements.

§ 8-505. Duty of Securities Intermediary With Respect to Payments and Distributions.

(a) A securities intermediary shall take action to obtain a payment or distribution made by the issuer of a financial asset. A securities intermediary satisfies the duty if:

(1) the securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) in the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to attempt to obtain the payment or distribution.

(b) A securities intermediary is obligated to its entitlement holder for a payment or distribution made by the issuer of a financial asset if the payment or distribution is received by the securities intermediary.

§ 8-506. Duty of Securities Intermediary to Exercise Rights as Directed by Entitlement Holder.

A securities intermediary shall exercise rights with respect to a financial asset if directed to do so by an entitlement holder. A securities intermediary satisfies the duty if:

(1) the securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) in the absence of agreement, the securities intermediary either places the entitlement holder in a position to exercise the rights directly or exercises due care in accordance with reasonable commercial standards to follow the direction of the entitlement holder.

§ 8-507. Duty of Securities Intermediary to Comply With Entitlement Order.

(a) A securities intermediary shall comply with an entitlement order if the entitlement order is originated by the appropriate person, the securities intermediary has had reasonable opportunity to assure itself that the entitlement order is genuine and authorized, and the securities intermediary has had reasonable opportunity to

comply with the entitlement order. A securities intermediary satisfies the duty if:

(1) the securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) in the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to comply with the entitlement order.

(b) If a securities intermediary transfers a financial asset pursuant to an ineffective entitlement order, the securities intermediary shall reestablish a security entitlement in favor of the person entitled to it, and pay or credit any payments or distributions that the person did not receive as a result of the wrongful transfer. If the securities intermediary does not reestablish a security entitlement, the securities intermediary is liable to the entitlement holder for damages.

§ 8-508. Duty of Securities Intermediary to Change Entitlement Holder's Position to Other Form of Security Holding.

A securities intermediary shall act at the direction of an entitlement holder to change a security entitlement into another available form of holding for which the entitlement holder is eligible, or to cause the financial asset to be transferred to a securities account of the entitlement holder with another securities intermediary. A securities intermediary satisfies the duty if:

(1) the securities intermediary acts as agreed upon by the entitlement holder and the securities intermediary; or

(2) in the absence of agreement, the securities intermediary exercises due care in accordance with rea-

sonable commercial standards to follow the direction of the entitlement holder.

* * * * *

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IN THE

Supreme Court of the United States

BANK MARKAZI, AKA THE CENTRAL BANK OF IRAN,
Petitioner,

v.

DEBORAH PETERSON, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

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QUESTION PRESENTED

Whether Section 502 of the Iran Threat Reduction and Syria Human Rights Act, 22 U.S.C. § 8772, violates the constitutional separation of powers because it amends existing law applicable to claims seeking execution against particular assets to satisfy federal-court judgments obtained by victims of state-sponsored terrorism.

TABLE OF CONTENTS

Page

INTRODUCTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 4

STATEMENT 4

SUMMARY OF ARGUMENT 13

ARGUMENT 15

I. SECTION 8772 COMPORTS WITH THE SEPARATION OF POWERS 15

A. Section 8772 Is A Valid Exercise Of Congress's Power To Modify The Law Applicable To Pending Cases 16

1. Congress May Amend The Law For Particular Pending Cases In Outcome-Determinative Ways 16

2. *Klein* Confirms That Congress Can Enact Statutes That Affect The Result In Specific Cases If It Can And Does Change The Law 26

3. Section 8772 Validly Amends The Law Applicable To Respondents' Claims Regarding Issues Within Congress's Legislative Authority 31

B. Petitioner's Invented Limitations On Congress's Authority Have No Basis In The Constitution Or Precedent 35

1. Petitioner's "Single Pending Case" Exception Is Baseless And Inapplicable To Section 8772 36

TABLE OF CONTENTS *(continued)*

Page

2. Petitioner's "Effectively Dictate The Outcome" Exception Is Also Meritless And Inapplicable 47

II. SECTION 201 OF THE TRIA INDEPENDENTLY AUTHORIZES EXECUTION AGAINST THE IRANIAN ASSETS 53

CONCLUSION 58

TABLE OF APPENDICES

Page

APPENDIX A: Underlying actions against Iran brought by plaintiffs whose claims for execution were consolidated in No. 10 Civ. 4518 (KBF) (S.D.N.Y.) 1a

APPENDIX B: Constitutional Provisions, Statutes, And Rules 3a

U.S. Const. art. I, § 8, cl. 3 ..... 3a

U.S. Const. art. I, § 9, cl. 3 ..... 3a

U.S. Const. art. III 3a

U.S. Const. art. VI, cl. 2 ..... 5a

U.S. Const. amend. V 5a

Act of Aug. 31, 1852, ch. 111, §§ 6-7, 10 Stat. 110, 112 ..... 6a

Act of July 12, 1870, ch. 251, § 1, 16 Stat. 230, 235 ..... 6a

Pub. L. No. 101-121, § 318(b), 103 Stat. 701, 745 (1989) 8a

Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201(a)-(b), (d), 116 Stat. 2322, 2337, 2339, codified at 28 U.S.C. § 1610 note 13a

Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502, 126 Stat. 1214, 1258, codified at 22 U.S.C. § 8772 ..... 16a

15 U.S.C. § 78aa–1 ..... 22a

15 U.S.C. § 7902 ..... 23a

TABLE OF APPENDICES *(continued)*

Page

15 U.S.C. § 7903 ..... 23a

25 U.S.C. § 1701 ..... 29a

25 U.S.C. § 1702 ..... 30a

25 U.S.C. § 1705 ..... 31a

28 U.S.C. § 1602 ..... 34a

28 U.S.C. § 1603 ..... 34a

28 U.S.C. § 1604 ..... 35a

28 U.S.C. § 1605 ..... 36a

28 U.S.C. § 1605A 42a

28 U.S.C. § 1606 ..... 48a

28 U.S.C. § 1607 ..... 48a

28 U.S.C. § 1608 ..... 49a

28 U.S.C. § 1609 ..... 52a

28 U.S.C. § 1610 ..... 52a

28 U.S.C. § 1611 ..... 58a

N.Y. C.P.L.R. § 5240 ..... 59a

U.C.C. § 8-112 ..... 60a

U.C.C. § 8-503 ..... 61a

Fed. R. Civ. P 69 ..... 63a

TABLE OF AUTHORITIES

CASES **Page(s)**

Alice Corp. v. *CLS Bank Int'l*,
134 S. Ct. 2347 (2014) 55

Antonio v. *Wards Cove Packing Co.*,
10 F.3d 1485 (9th Cir. 1993) 42

Ashwander v. *TVA*,
297 U.S. 288 (1936) 53

Axel Johnson Inc. v. *Arthur Andersen & Co.*,
6 F.3d 78 (2d Cir. 1993) 43

Appeal of Baggs,
43 Pa. 512 (1862) 38

Bennett v. *Islamic Republic of Iran*,
799 F.3d 1281 (9th Cir. 2015) 56

Breard v. *Greene*,
523 U.S. 371 (1998) 40

Cadle Co. v. *Whataburger of Alice, Inc.*,
174 F.3d 599 (5th Cir. 1999) 45

Calder v. *Bull*,
3 U.S. (3 Dall.) 386 (1798) 38

Cisneros v. *Alpine Ridge Group*,
508 U.S. 10 (1993) 40, 57

City of New York v. *Beretta U.S.A. Corp.*,
524 F.3d 384 (2d Cir. 2008) 43

EM Ltd. v. *Republic of Argentina*,
2009 WL 2568433
(S.D.N.Y. Aug. 18, 2009) 56

TABLE OF AUTHORITIES *(continued)*

CASES *(continued)* **Page(s)**

Estate of Heiser v. *Islamic Republic of Iran*,
807 F. Supp. 2d 9 (D.D.C. 2011) 5

Export-Import Bank of U.S. v. *Asia Pulp & Paper Co., Ltd.*,
609 F.3d 111 (2d Cir. 2010) 56

Ex parte Garland,
71 U.S. (4 Wall.) 333 (1867) 28, 29

Gelboim v. *Bank of Am. Corp.*,
135 S. Ct. 897 (2015) 45

Golan v. *Holder*,
132 S. Ct. 873 (2012) 41

Gonzales v. *O Centro Espirita Beneficente Uniao do Vegetal*,
546 U.S. 418 (2006) 55

Graham v. *Connor*,
490 U.S. 386 (1989) 39

Gray v. *First Winthrop Corp.*,
989 F.2d 1564 (9th Cir. 1993) 43

Guardian Loan Co. v. *Early*,
392 N.E.2d 1240 (N.Y. 1979) 52

Holden v. *James*,
11 Mass. (11 Tyng) 396 (1814) 38

Ileto v. *Glock, Inc.*,
565 F.3d 1126 (9th Cir. 2009) 43

Johnson v. *United States*,
135 S. Ct. 2551 (2015) 49

TABLE OF AUTHORITIES *(continued)*

CASES *(continued)* **Page(s)**

Jones' Heirs v. *Perry*,
18 Tenn. (10 Yer.) 59 (1836) 38

Keene Corp. v. *United States*,
508 U.S. 200 (1993).....33

Kline v. *Burke Constr Co.*,
260 U.S. 226 (1922).....33

Kontrick v. *Ryan*,
540 U.S. 443 (2004).....33

Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*,
501 U.S. 350 (1991).....23

Landgraf v. *USI Film Prods.*,
511 U.S. 244 (1994).....17, 18, 42

Lewis v. *Webb*,
3 Me. 326 (1825).....38

McCullough v. *Virginia*,
172 U.S. 102 (1898).....25

Me. Cent. R.R. Co. v. *Bhd. of Maint. of Way Emps.*,
835 F.2d 368 (1st Cir. 1987) 43

Merrill v. *Sherburne*,
1 N.H. 199 (1818).....38

Miller v. *French*,
530 U.S. 327 (2000).....26

N. Ins. Co. of N.Y. v. *Chatham Cnty., Ga.*,
547 U.S. 189 (2006).....55

TABLE OF AUTHORITIES *(continued)*

CASES *(continued)* **Page(s)**

Nixon v. *Adm'r of Gen. Servs.*,
433 U.S. 425 (1977) 37

OBB Personenverkehr AG v. *Sachs*,
136 S. Ct. 390 (2015) 31, 36

O'Conner v. *Warner*,
4 Watts & Serg. 223 (Pa. 1842) 38

Palermo v. *United States*,
360 U.S. 343 (1959) 33

Paramino Lumber Co. v. *Marshall*,
309 U.S. 370 (1940) 41

Pearson v. *Callahan*,
555 U.S. 223 (2009) 53, 57

Pennsylvania v. *Wheeling & Belmont Bridge Co.*,
54 U.S. (13 How.) 518 (1852) 20, 42

Pennsylvania v. *Wheeling & Belmont Bridge Co.*,
59 U.S. (18 How.) 421 (1856) 18, 20, 21, 35, 36, 42, 48

Peterson v. *Islamic Republic of Iran*,
264 F Supp. 2d 46 (D.D.C. 2003) 5, 6

Plaut v. *Spendthrift Farm, Inc.*,
514 U.S. 211 (1995) 14, 16, 17, 18, 19, 23, 24, 25, 26, 31, 32, 35, 37, 39, 40, 41, 43, 49

Pope v. *United States*,
323 U.S. 1 (1944) 19, 48, 52

TABLE OF AUTHORITIES *(continued)*

CASES *(continued)* **Page(s)**

Reiser v. *William Tell Saving Fund Ass'n*,
39 Pa. 137 (1861).....38

Republic of Argentina v. *NML Capital, Ltd.*,
134 S. Ct. 2250 (2014).....5, 34

Riggs v. *Johnson Cnty.*,
73 U.S. (6 Wall.) 166 (1867).....33

Robertson v. *Seattle Audubon Society*,
503 U.S. 429 (1992).....13, 18, 21, 22, 23, 24, 26, 31, 32, 33, 35, 42, 48

The Schooner Exchange v. *McFaddon*,
11 U.S. (7 Cranch) 116 (1812) 4

Tate's Ex'rs v. *Bell*,
12 Tenn. (4 Yer.) 202 (1833) 38

United States v. *All Funds on Deposit with R.J. O'Brien & Assocs.*,
783 F.3d 607 (7th Cir. 2015).....66

United States v. *Klein*,
80 U.S. (13 Wall.) 128 (1872).....12, 14, 24, 26, 27, 28, 29, 30, 31, 36, 48

United States v. *Padelford*,
76 U.S. (9 Wall.) 531 (1870).....27, 28

United States v. *Schooner Peggy*,
5 U.S. (1 Cranch) 103 (1801) 16

Verlinden B.V. v. *Cent. Bank of Nigeria*,
461 U.S. 480 (1983).....4, 5, 34

Weininger v. *Castro*,
462 F. Supp. 2d 457 (S.D.N.Y. 2006).....56

TABLE OF AUTHORITIES *(continued)*

CASES *(continued)* **Page(s)**

Whitley v. *Albers*,
475 U.S. 312 (1986) 39

Wultz v. *Islamic Republic of Iran*,
864 F. Supp. 2d 24 (D.D.C. 2012) 47

Yeager v. *United States*,
557 U.S. 110 (2009) 53

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 17

U.S. Const. art. I, § 9, cl. 3 17

U.S. Const. art. III, § 1 33

U.S. Const. art. VI, cl. 2 30

STATUTES

Act of June 30, 1834, ch. 213, 6 Stat. 589 41

Act of Mar. 3, 1843, ch. 131, 6 Stat. 895 41

Act of Feb. 19, 1849, ch. 57, 9 Stat. 763 41

Act of May 30, 1862, ch. 88, 12 Stat. 904 41

Act of July 17, 1862, ch. 195, 12 Stat. 589 26

Act of Mar. 12, 1863, ch. 120, 12 Stat. 820 27

Act of July 12, 1870, ch. 251, 16 Stat. 235 28

Act of June 11, 1878, ch. 187, 20 Stat. 542 41

Act of Feb. 17, 1898, ch. 29, 30 Stat. 1396 41

TABLE OF AUTHORITIES *(continued)*

STATUTES *(continued)* **Page(s)**

Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502, 126 Stat. 1214, codified at 22 U.S.C. § 8772 ..... 1, 9, 10, 11, 32, 46, 47, 50, 51, 52

Pub. L. No. 101-121, § 318, 103 Stat. 701, 745 (1989) 22, 23

Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201(a), 116 Stat. 2322, 2337, codified at 28 U.S.C. § 1610 note 7, 53, 57

12 U.S.C. § 4617 20

15 U.S.C. § 77m 20

15 U.S.C. § 78j 24

15 U.S.C. § 78aa–1 ..... 24, 43

15 U.S.C. § 7902 43

15 U.S.C. § 7903 43

25 U.S.C. § 1701 42

25 U.S.C. § 1702 42

25 U.S.C. § 1705 42

25 U.S.C. § 1721 42

25 U.S.C. § 1722 42

25 U.S.C. § 1723 42

25 U.S.C. § 1741 42

25 U.S.C. § 1742 42

TABLE OF AUTHORITIES *(continued)*

STATUTES *(continued)* **Page(s)**

25 U.S.C. § 1744 42
25 U.S.C. § 1751 42
25 U.S.C. § 1752 42
25 U.S.C. § 1753 42
25 U.S.C. § 1771 42
25 U.S.C. § 1771b 42
28 U.S.C. § 1602 5
28 U.S.C. § 1604 5
28 U.S.C. § 1605 ..... 5, 6
28 U.S.C. § 1605A 5, 6
28 U.S.C. § 1606 5
28 U.S.C. § 1607 5
28 U.S.C. § 1608 6
28 U.S.C. § 1609 5
28 U.S.C. § 1610 ..... 5, 7
28 U.S.C. § 1611 ..... 5, 57
28 U.S.C. § 2072 ..... 34, 45
31 U.S.C. § 3730 20
47 U.S.C. § 230 20
N.Y. C.P.L.R. § 5240 52
U.C.C. § 8-112 56
U.C.C. § 8-503 55

TABLE OF AUTHORITIES *(continued)*

RULES **Page(s)**

Fed. R. Civ. P 19 45

Fed. R. Civ. P 23 45

Fed. R. Civ. P 69 34

OTHER AUTHORITIES

Jennifer K. Elsea, Cong. Research Serv., RL31258, *Suits Against Terrorist States by Victims of Terrorism* (2008) 5

Exec. Order No. 13,599, 77 Fed. Reg. 6659 (Feb. 5, 2012) 8, 9, 53

7A Hawkland U.C.C. Series § 8-503:01 [Rev] 55, 56

Abraham Lincoln, Message to Congress (Dec. 8, 1863) 27

Matthew Mantel, *Private Bills & Private Laws*, 99 Law Libr. J. 87 (2007) 19

Press Release, U.S. Treasury Dep't, Treasury Department Reaches Landmark $152 Million Settlement with Clearstream Banking, S.A. (Jan. 23, 2014), http://tinyurl.com/otdl4qg 8

Resp. Br., *Plaut* v. *Spendthrift Farm, Inc.*, No. 93-1121 (Sept. 9, 1994), 1994 WL 496344 24

TABLE OF AUTHORITIES *(continued)*

OTHER AUTHORITIES *(continued)* **Page(s)**

Amanda L. Tyler, *The Story of* Klein*: The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts*, in *Federal Courts Stories* 87 (Vicki Jackson & Judith Resnik eds., 2010) 27, 31

U.C.C. art. 8 prefatory note II.C (1994) 56

INTRODUCTION

Petitioner Bank Markazi, the central bank of Iran, seeks to evade responsibility for horrific acts of terrorism that federal courts have definitively concluded that Iran committed. Those courts have awarded billions of dollars in damages in final judgments whose validity petitioner does not dispute. Nevertheless, petitioner claims that assets it owns in the United States cannot be used to satisfy these judgments because they are not subject to execution. In our constitutional structure, however, whether foreign states' property is immune from execution is a decision for the political Branches—in particular, Congress. And Congress has exercised that authority, enacting a statute that, on the facts of this case, entitles respondents—more than 1,000 of Iran's victims—to relief.

Petitioner urges the Court to disregard Congress's direction, and to declare the law eliminating alleged obstacles to execution unconstitutional. But petitioner does not contend that the statute in dispute, 22 U.S.C. § 8772, oversteps any enumerated constitutional constraint on Congress's power. Petitioner instead asks the Court to pronounce two new, unwritten limitations on congressional authority, which it asserts can be inferred from the separation of powers writ large. Its arguments for novel, atextual limitations on Congress's authority are baseless and subvert the constitutional structure.

Petitioner's submission starts from the fundamentally flawed premise that federal courts are free to impose on other Branches restrictions that the Framers did not. That premise is irreconcilable with the constitutional design. The Constitution places specific outer limits on Congress's authority: Con-

gress may exercise only its enumerated powers, cannot intrude on powers conferred on other Branches, and cannot contravene specific prohibitions on federal law. Within those boundaries, courts cannot superimpose additional limits on Congress's authority. It would defeat the carefully crafted structure of checks and balances to allow courts to invent additional strictures on an ad hoc basis.

The limits petitioner asks this Court to find in the constitutional ether are disconnected from—indeed, contrary to—well-established principles and precedent. Petitioner proposes novel prohibitions on laws that affect a "single pending case" or "effectively dictate the outcome" of particular cases. Neither limit has any basis in the Constitution's text or structure or in this Court's case law. Petitioner tries to ground both limits in Article III, but no plausible reading of the Constitution's grant of the "judicial Power" supports either of petitioner's contrived restrictions. Congress may not nullify final federal-court judgments, but nothing in the Constitution bars Congress either from modifying the applicable law *before* the Judicial Department has rendered a final decision, or from modifying the terms on which that judgment may be enforced. The Framers' inclusion of express provisions addressing particularized or retroactive laws makes petitioner's effort to read into Article III unwritten limitations on the same topics untenable. Indeed, only petitioner knows what exactly either of its proposed exceptions encompasses. Ambiguous and elastic boundaries—whose meaning neither Congress nor the Executive can discern—only hinder the proper functioning of the separation of powers.

The unprecedented and inscrutable constraints petitioner advocates are academic in any event because neither would apply to Section 8772. That statute does not affect only a single pending case; this proceeding is a composite of more than a dozen consolidated actions—comprising claims of more than 1,000 victims of multiple acts of Iran-sponsored terrorism over three decades, who already hold numerous binding (but unpaid) judgments. Some of those actions were added to the docket *after* Section 8772 opened this proceeding to *all* victims of Iranian terrorism. Section 8772 also does not decree Iran liable to anyone; Iran's liability has already been definitively adjudicated. And Section 8772 does not even make execution a foregone conclusion—as the district court, tasked with finding the relevant facts, made clear. Moreover, Section 8772 merely provides an additional path to the same result that would have obtained under the Terrorism Risk Insurance Act of 2002 ("TRIA")—whose constitutionality petitioner does not question, and which (as the district court concluded) independently entitles respondents to execution.

Petitioner transparently seeks to evade the will of the political Branches by foreclosing one of the few available avenues for Iran's victims—many of whom have waited decades for relief—to collect their judgments. Crediting petitioner's arguments would mark a significant departure from this Court's precedent and the constitutional structure. This Court should reject petitioner's effort to distort this Republic's Constitution for its own gain, and should affirm the court of appeals' judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional provisions, statutes, and rules are reprinted in Appendix B, *infra*.

STATEMENT

1. Determining whether private citizens may seek redress for wrongs committed by foreign states has always been the domain of the political Branches. Originally, foreign states enjoyed "virtually absolute immunity" from suit. *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). "[F]oreign sovereign immunity," however, "is a matter of grace and comity" rather than a constitutional requirement, and "this Court consistently has deferred to the decisions of the political branches ... on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Ibid.* (citing *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812)). In particular, "[b]y reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States." *Id.* at 493.

Congress did not enact general legislation addressing foreign sovereign immunity for many years. In the interim, courts looked to the Executive Branch for guidance. *Verlinden*, 461 U.S. at 486-87 The Executive ultimately adopted a "restrictive" theory of foreign sovereign immunity, under which only foreign states' public acts, but not their "commercial acts," were immune. *Id.* at 487 The Executive's views, however, increasingly failed to provide courts with adequate guidance. *See id.* at 487-88.

Congress intervened in 1976 by enacting the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, which created a "'comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.'" *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2255 (2014) (citation omitted). "For the most part," the FSIA "codifie[d]" the restrictive theory, but it established various exceptions permitting particular types of suits. *Verlinden*, 461 U.S. at 488; *see* 28 U.S.C. §§ 1604-1607 The FSIA also addresses immunity of foreign states' property from execution, likewise subject to an array of exceptions. *See* 28 U.S.C. §§ 1609-1611. Over time Congress has amended and added to these exceptions to make redress available in additional circumstances.

One area where Congress has steadily sought to make relief more readily available involves victims of terrorism sponsored by foreign states—including petitioner's sole owner, Iran. Iran has long sponsored and financed terrorist attacks. *Peterson* v. *Islamic Republic of Iran*, 264 F. Supp. 2d 46, 51-55 (D.D.C. 2003). For example, in 1983, Hezbollah—sponsored by Iran—detonated a truck bomb at a Marine barracks in Beirut, Lebanon, killing 241 American servicemen and wounding dozens more. *Ibid.* Another 19 U.S. servicemen were killed, and hundreds more wounded, in the 1996 bombing of the Khobar Towers in Saudi Arabia. *Estate of Heiser* v. *Islamic Republic of Iran*, 807 F. Supp. 2d 9, 11 (D.D.C. 2011).

Before 1996, victims of such horrific attacks were unable to seek damages against Iran because "foreign States were immune from civil liability in U.S. courts for injuries caused by acts of terrorism carried out by their agents and proxies." Jennifer K. Elsea,

Cong. Research Serv., RL31258, *Suits Against Terrorist States by Victims of Terrorism* 1 (2008). Congress amended the FSIA in 1996 to allow suits by U.S. victims of acts of terrorism committed by a state or its agents. *See* 28 U.S.C. § 1605(a)(7), *recodified as amended at id.* § 1605A.

2. Respondents are more than 1,000 American victims of Iran-sponsored terrorist attacks and their surviving family members and representatives. Pet. App. 21a, 52a-53a; *see also id.* at 130a-44a. Following the statutory amendments permitting terrorism-based suits against foreign states, respondents brought numerous separate actions against Iran for terrorist attacks that it had financed and organized. *Id.* at 16a-19a, 52a-53a n.1 (listing cases); Appendix A. Respondent Deborah Peterson, for example, is the representative of the estate of her brother, Lance Cpl. James C. Knipple, who was killed in the Beirut Marine-barracks bombing. In 2001, Peterson brought a wrongful-death action against Iran for its role in that attack. *Peterson*, 264 F. Supp. 2d 46. Hundreds of other similarly aggrieved families and survivors (collectively the "*Peterson* respondents") joined her in that action.

Although duly served, Iran refused to appear in any of these actions. The FSIA, however, does not allow courts automatically to enter default judgments against foreign states. 28 U.S.C. § 1608(e). Instead, the claimants must establish their claims "by evidence satisfactory to the court." *Ibid.* After bench trials, the courts in respondents' cases held that the plaintiffs proved by "clear and convincing evidence" that Iran was liable for the terrorist attacks that harmed respondents and their families. *See, e.g.*, *Peterson*, 264 F. Supp. 2d at 48, 61. Collec-

tively, respondents have "obtained billions of dollars in judgments against Iran." Pet. App. 53a. While not disputing the validity of these final judgments, Iran has refused to satisfy them, and consequently the "vast majority ... remain unpaid." *Ibid.*

Because terrorism victims have faced great difficulty collecting final judgments, Congress has enacted several statutes specifically addressing execution. In 2002, Congress enacted TRIA Section 201(a), which subjects assets of a "terrorist party" to execution by judgment-holders when those assets have been "blocked," *i.e.*, frozen, by the President. Pub. L. No. 107-297, § 201(a), 116 Stat. 2322, 2337 (codified at 28 U.S.C. § 1610 note). Section 201(a) provides:

> Notwithstanding any other provision of law, ... in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, ... the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment ....

Ibid.; *see also* 28 U.S.C. § 1610(f)(1)(A), (g)(1).

3. Petitioner Bank Markazi—Iran's wholly owned central bank—attempted to conceal its interest in nearly $2 billion in bonds it held at an account at Citibank in New York through a chain of middlemen (the "Iranian Assets"). Pet. App. 2a.[1] The ac-

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[1] The last of the bonds matured in 2012, and the Iranian Assets now consist entirely of cash. Pet. App. 61a, 64a.

count at Citibank is an omnibus account for Clearstream Bank, S.A., a Luxembourg-based financial intermediary, which maintains the account for (among others) the Italian bank Banca UBAE S.p.A., "whose customer, in turn, is Bank Markazi." Pet. App. 2a. Clearstream since has paid a $152 million fine to settle its potential liability for violating sanctions against Iran in its dealings with respect to the Iranian Assets. Press Release, U.S. Treasury Dep't, Treasury Department Reaches Landmark $152 Million Settlement with Clearstream Banking, S.A. (Jan. 23, 2014), http://tinyurl.com/otdl4qg.

After discovering petitioner's interest in the Iranian Assets, the *Peterson* respondents sought restraints on them in the Southern District of New York. Pet. App. 3a. That court restrained the assets, and the *Peterson* respondents commenced an action seeking turnover to satisfy their judgments. *Id.* at 12a-14a, 62a-63a. Other groups of terrorist-victim plaintiffs who had obtained judgments against Iran served Citibank or Clearstream with similar restraining notices asserting claims on the Iranian Assets. *Id.* at 15a. The district court authorized Citibank to serve interpleader petitions on those respondents. *Ibid.* Still other plaintiff groups were added to this consolidated case by motions to intervene or by agreement. *Id.* at 15a-19a. All told, as many as 19 separate actions—comprising well over a thousand individuals—have been consolidated. *Id.* at 16a-19a, 52a-53a & n.1.

While those proceedings were pending, President Obama issued an Executive Order blocking all assets of Iran and its agencies and instrumentalities (including petitioner) "that are in the United States." Exec. Order No. 13,599, 77 Fed. Reg. 6659, 6659

(Feb. 5, 2012). The Order sought to combat "the deceptive practices of the Central Bank of Iran and other Iranian banks to conceal transactions of sanctioned parties." *Ibid.* Citibank placed the Iranian Assets in a segregated account, as required by federal regulations. Pet. App. 64a. Once the Iranian Assets were blocked, respondents sought turnover under TRIA Section 201(a), and moved for summary judgment under that statute. *Id.* at 3a.

4. In August 2012, while the parties litigated turnover under TRIA Section 201(a), Congress enacted, and the President signed, the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214. Section 502 of that Act, codified at 22 U.S.C. § 8772, provides that, "notwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law," assets "shall be subject to execution" if:

- the assets are "blocked assets";
- they are "equal in value to a financial asset of Iran";
- they are "held in the United States for a foreign securities intermediary doing business in the United States";
- they are among "the financial assets that are identified in and the subject of proceedings in" this consolidated action;
- they "remain restrained by court order";
- execution is sought to "satisfy any judgment ... against Iran for damages for personal injury or death caused by" "extrajudicial killing" and other enumerated terrorist acts; *and*

- the court "determine[s]" that (1) "Iran holds equitable title to, or the beneficial interest in, the assets," and (2) "no other person possesses a constitutionally protected interest in the[m]."

Id. § 8772(a)-(b). Section 8772 defines "Iran" to include petitioner. *Id.* § 8772(d)(3).

Section 8772, like TRIA Section 201(a), thus provides an independent basis to execute against the Iranian Assets, but in certain respects Section 8772 expands the circumstances in which the enhanced execution remedies apply. While Section 201(a) permits execution only for judgments under specific FSIA provisions, Section 8772 applies to "any judgment" against Iran for enumerated acts of terrorism. 22 U.S.C. § 8772(a)(1). It also permits execution "whether or not" the blocked assets are "subsequently unblocked." *Id.* § 8772(a)(1)(B).

In one important respect, Section 8772 is narrower than TRIA Section 201(a): It applies only to the assets that are "the subject of" these consolidated proceedings, *i.e.*, the Iranian Assets. 22 U.S.C. § 8772(b), (c)(1). Section 8772 does not, however, confine its effect solely to the parties already part of the consolidated case when Section 8772 took effect in October 2012. Indeed, months after Section 8772's effective date, additional terrorism victims holding judgments against Iran intervened to assert claims to the Iranian Assets. Pet. App. 18a-19a. As the district court recognized, "*all* potential claimants to the [Iranian] Assets" were "brought before this Court in these proceedings," enabling the court to discharge Citibank "from any and all liability with respect to any and all claims made by any party with regard to the [Iranian] Assets." *Id.* at 21a (emphasis added).

In light of Section 8772, respondents supplemented their summary-judgment motion, arguing that Section 8772's requirements were met and provided an additional basis for execution. Pet. App. 4a. Petitioner and the other defendants "d[id] not dispute the validity of plaintiffs' judgments," but did dispute whether the Iranian Assets were subject to turnover under the TRIA and Section 8772. *Id.* at 55a. Clearstream, for example, argued (*inter alia*) that Section 8772 did not permit execution because Clearstream had a constitutionally protected interest in the Iranian Assets. *See id.* at 109a, 111a-12a, 116a-19a; 22 U.S.C. § 8772(a)(2)(B); *see also* Clearstream § 8772 Summ. J. Opp. 11-19 (S.D.N.Y. Oct. 26, 2012) (sealed) ("Clearstream S.J. Opp.").

5. The district court granted respondents summary judgment. Pet. App. 4a. It first concluded that the blocked Iranian Assets are subject to turnover under TRIA Section 201(a) because petitioner "is the[ir] only owner." *Id.* at 97a-98a & n.10.

The court further held that Section 8772 independently authorizes execution. Pet. App. 111a-13a. The court rejected petitioner's contention that Section 8772 violates the separation of powers, explaining that the statute "does not 'usurp the adjudicative function assigned to the federal courts,'" but "merely 'changes the law applicable to pending cases.'" *Id.* at 115a (brackets and citation omitted). Section 8772 also does not "dictate specific factual findings," but rather "requires the Court to make determinations." *Id.* at 114a-15a. While the court ultimately found each necessary element satisfied, "it [was] quite possible that the Court could have found that defendants raised a triable issue" on several of them, and

"[t]here [was] frankly plenty for th[e] Court to adjudicate." *Id.* at 115a.

The district court rejected petitioner's remaining arguments and ordered Citibank to turn over the Iranian Assets. Pet. App. 22a-26a. Respondents subsequently "settled with Clearstream and UBAE," leaving petitioner "as the sole appellant." *Id.* at 4a.

6. The Second Circuit unanimously affirmed. Pet. App. 1a-12a. Although the parties fully briefed turnover under the TRIA, the court found it unnecessary to decide that issue because it held that respondents were entitled to execution under Section 8772. *Id.* at 5a.

Petitioner argued that Section 8772 "violat[es] the separation of powers between the legislative branch and the judiciary under Article III by compelling the courts to reach a predetermined result." Pet. App. 7a. Petitioner acknowledged that statutes comport with Article III and this Court's decision in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), if they "merely 'chang[e] the law applicable to pending cases,'" but contended that Section 8772 violated that principle. Pet. C.A. Br. 48-49 (citation omitted).

The Second Circuit rejected petitioner's contentions. Under this Court's case law, it explained, while "Congress may not usurp the adjudicative function assigned to the federal courts," Congress "may change the law applicable to pending cases, even when the result under the revised law is clear." Pet. App. 8a (internal quotation marks and brackets omitted). Section 8772, the court held, comports with that principle. *Id.* at 9a. It "does not compel judicial findings under old law; rather, it changes the law applicable to this case ... [and] explicitly leaves

the determination of certain facts to the courts." *Ibid.* The court analogized Section 8772 to the statute upheld by this Court in *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992). Just as the statute in *Robertson* was permissible because it "'affected the adjudication of the cases'" by "'effectively modifying the provisions at issue in those cases,' not by compelling findings or results under those provisions," Section 8772 "does not compel judicial findings under old law; rather, it changes the law applicable to this case." Pet. App. 8a-9a (quoting *Robertson*, 503 U.S. at 440).[2]

The court of appeals denied rehearing. Pet. App. 128a.

SUMMARY OF ARGUMENT

I. Section 8772 is fully consistent with the separation of powers.

A. This Court's precedents and the Constitution's structure establish that Congress may enact laws that affect pending litigation; that are tailored to particular property, persons, or claims; and that are dispositive of particular claims. This Court has upheld statutes enacted to govern the outcome of specific, pending litigation concerning a single

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[2] Petitioner did not argue below, as it does now, that Article III and *Klein* forbid Congress from legislating as to a "single pending case." Pet. Br. 22; *see* Pet. C.A. Br. 48-56. Consequently, neither court below addressed that contention. Petitioner did argue that permitting turnover would constitute an unlawful taking and would violate the Treaty of Amity between the United States and Iran. The Second Circuit rejected both contentions. Pet. App. 5a-7a, 10a-11a.

bridge, particular forests, or a known, closed set of specific pending lawsuits.

Klein, 80 U.S. (13 Wall.) 128, casts no doubt on these principles. *Klein* confirmed that Congress may change the outcome in specific cases so long as Congress does so by altering the applicable law. *Klein* merely recognized the corollary that Congress may not direct Article III courts to reach a specific result, or dictate what effect to give particular evidence, *without* changing the applicable law—including where, as in *Klein* itself, Congress lacks authority to alter that law.

These principles and precedents resolve this case. Petitioner concedes that Section 8772 establishes new legal standards. And the subjects it addresses—federal-court jurisdiction and procedure, and the immunity *vel non* of foreign sovereigns' assets from execution—fall squarely within Congress's authority.

B. Petitioner nevertheless urges the Court to invalidate Section 8772 by adopting two unprecedented exceptions to Congress's authority: prohibitions on statutes that change the law for a "single pending case," or that "effectively dictat[e] the outcome" of specific cases. Pet. Br. 22, 42. Neither exception has any foothold in the constitutional text or structure or in this Court's precedents. Both exceptions, moreover, are arbitrary and impractical, and would yield irrational results and blur the "clear distinctions" essential to the separation of powers. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995).

Each purported exception is unavailing for petitioner in any event because neither would apply to Section 8772. The statute does *not* affect only a sin-

gle pending case. Although it applies only to these proceedings, these proceedings encompass numerous claims for execution against particular assets by *any* victim of Iranian terrorism consolidated in this omnibus action—including individuals added to the case *after* Section 8772's enactment. Section 8772 also does not dictate the outcome of those claims. It establishes legal standards requiring courts to make various determinations that could be, and were, disputed here. And it permits execution only to the extent that the assets remain restrained by court order—restraints that, under state law, the court retained broad discretion to lift for various reasons.

II. This Court need not—and therefore should not—decide petitioner's constitutional attack on Section 8772 because it can and should affirm the judgment below on an independent ground. As the district court correctly held, petitioners are separately entitled to execution under TRIA Section 201(a), which is not even arguably subject to petitioner's constitutional challenges. Petitioner's arguments below that its 100-percent interest in the Iranian Assets is insufficient for execution under Section 201(a) are meritless.

ARGUMENT

I. SECTION 8772 COMPORTS WITH THE SEPARATION OF POWERS.

Section 8772's validity follows straightforwardly from first principles and settled precedent establishing that Congress may amend the law applicable to pending cases. Petitioner invites the Court to strike down that statute based on arbitrary exceptions to this principle that lack any foundation in the Consti-

tution or this Court's case law. The Court should decline.

A. Section 8772 Is A Valid Exercise Of Congress's Power To Modify The Law Applicable To Pending Cases.

This Court's decisions make clear that Congress may alter the law applicable to pending litigation—even if the change affects only a limited number of claims, and even if it resolves the only seriously disputed issues in a given case. This Court has repeatedly upheld statutes that did just that. Section 8772 is fully consistent with these principles because it merely changed the law applicable to claims concerning specific property, on subjects within Congress's authority.

1. Congress May Amend The Law For Particular Pending Cases In Outcome-Determinative Ways.

a. Three well-settled principles together establish Congress's authority to amend the law applicable to specific pending cases in ways that influence the cases' outcome.

i. First, Congress unquestionably can amend the law applicable to pending civil cases, and courts must apply the law in effect at the time they render judgment. *See, e.g.*, *Plaut*, 514 U.S. at 226. Even after a trial court has rendered judgment, "if subsequent to th[at] judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). And "[i]f the law be constitutional, ... no court ... can contest its obligation." *Ibid.* Congress's power to al-

ter the applicable law ceases only when "all appeals have been forgone or completed," and the "final word of the [judicial] department as a whole" has been rendered. *Plaut*, 514 U.S. at 227

The Constitution's structure reinforces this principle. The Framers established several specific restrictions on retroactive legislation, but those "restrictions ... are of limited scope." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 267 (1994). The *Ex Post Facto* Clause, U.S. Const. art. I, § 9, cl. 3, prohibits laws that impose or increase penal sanctions for prior acts. The prohibition on federal bills of attainder, *ibid.*, "prohibit[s]" laws that "singl[e] out disfavored persons and met[e] out summary punishment for past conduct." *Landgraf*, 511 U.S. at 266. The Takings Clause forbids "depriving private persons of vested property rights except for a 'public use and upon payment of 'just compensation.'" *Ibid.* (quoting U.S. Const. amend. V). And "retroactive application" of a statute may lack a "justification sufficient" to satisfy due process. *Ibid.* "Absent a violation of one of those specific provisions," however, "the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope." *Id.* at 267 Indeed, the existence of these specific restrictions—and their particular prerequisites—presupposes that Congress otherwise may change the law in pending cases. Congress must "make its intention" to legislate retroactively

"clear." *Id.* at 268. But where it does so, courts must apply that law in pending cases. *See id.* at 273, 280.[3]

ii. Second, Congress indisputably can alter the law applicable to particular persons, property, or claims. "[L]aws that impose a duty or liability upon a single individual or firm are not on that account invalid," and "Congress may legislate 'a legitimate class of one.'" *Plaut*, 514 U.S. at 239 n.9 (citation omitted). The Court has repeatedly upheld laws addressed to specific property that was the subject of particular lawsuits—even a single case. *See, e.g.*, *Robertson*, 503 U.S. at 435, 437-41 (upholding statute concerning 13 specific forests in two States in two pending lawsuits specified in the statute); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.* (*Wheeling Bridge*), 59 U.S. (18 How.) 421, 429, 431-32 (1856) (upholding statute declaring particular bridge lawful that this Court had previously held unlawful).

This, too, fits perfectly with the Constitution's structure. The Constitution is not silent regarding particularized legislation, but establishes specific limits on it, such as the Bill of Attainder Clause. Such express prohibitions counsel strongly against reading in unwritten limitations. Otherwise, this Court "would not have the extensive jurisprudence that [it] do[es] concerning the Bill of Attainder Clause," which confines its application to laws that "'singl[e] out'" particular persons *and* inflict "*pun-*

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[3] Laws that "authoriz[e] or affec[t] the propriety of prospective relief," "confe[r] or ous[t] jurisdiction," or work "[c]hange[s] in procedural rules" generally may be applied to pending cases even without a clear congressional statement, because they concern what courts may do *going forward*. *Landgraf*, 511 U.S. at 273-75.

ishment." *Plaut*, 514 U.S. at 239 n.9 (citation omitted). Within the limits the Framers established, the decision of how narrowly to tailor legislation to address a particular problem belongs to the People's representatives.

Congress's authority to tailor laws to particular property, persons, or claims is powerfully confirmed by the centuries-old tradition of private bills—which by definition concern only one or a few parties. Such bills were ubiquitous at the Founding and long thereafter and addressed a range of particularized claims. *See Plaut*, 514 U.S. at 239 n.9; Matthew Mantel, *Private Bills & Private Laws*, 99 Law Libr. J. 87, 88-90 (2007). While the creation of specialized tribunals has decreased the practical need for private bills, they remain "common" in Congress today. *Plaut*, 514 U.S. at 239 n.9.

iii. Third, Congress may enact laws that are outcome-determinative in the cases to which they apply. "[V]irtually *all* of the reasons why a final judgment on the merits is rendered on a federal claim are subject to congressional control." *Plaut*, 514 U.S. at 228. "Congress can eliminate, for example, a particular element of a cause of action that plaintiffs have found it difficult to establish; or an evidentiary rule that has often excluded essential testimony; or a rule of offsetting wrong (such as contributory negligence) that has often prevented recovery." *Id.* at 228-29. Even statutes that render a plaintiff's claims "incontestable" or reduce the courts' role to performing "a mathematical computation" do not violate Article III. *Pope* v. *United States*, 323 U.S. 1, 11 (1944).

Conversely, subject to other specific constitutional constraints, nothing prevents Congress from enacting laws that clearly foreclose certain claims.

Numerous federal statutes have that effect—whether by barring certain claims altogether, *e.g.*, 47 U.S.C. § 230(c)(2) (barring claims against interactive-computer-service providers for restricting access to obscene material); conferring absolute defenses upon the defendant's proving particular facts, *e.g.*, 15 U.S.C. § 77m (three-year repose period for certain securities claims); or eliminating jurisdiction over particular claims, *e.g.*, 12 U.S.C. § 4617(b)(11)(D) (no jurisdiction over claims seeking payment from assets of entity for which Federal Housing Finance Agency acts as receiver); 31 U.S.C. § 3730(e)(1) (no jurisdiction over False Claims Act claims by one member of the military against another). The fact that laws render the fate of particular claims clear casts no doubt upon the validity of those laws.

b. It follows from these tenets that Congress can amend the law applicable to pending cases—even a specific, finite number—in outcome-determinative ways. This Court has consistently upheld statutes that did precisely that.

i. In *Wheeling Bridge*, 59 U.S. (18 How.) 421, this Court upheld a statute enacted specifically to resolve a dispute in a single case concerning the legality of a particular bridge. Pennsylvania had obtained a decree from this Court that the bridge unlawfully obstructed free navigation and posed a public nuisance, and an injunction requiring the bridge either to be raised (to allow ships to pass) or abated. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 578, 625-27 (1852). Congress subsequently passed a statute that "'declared'" the bridge "'to be [a] lawful structur[e] in [its] present positio[n] and elevatio[n,] ... anything in the law or laws of the United States to the contrary notwith-

standing.'" 59 U.S. (18 How.) at 429 (citation omitted). Relying on the new law, the bridge owner did not modify the bridge—and indeed rebuilt it when it was destroyed in a storm. *Id.* at 422-24.

Pennsylvania sought a writ of attachment against the company for disobeying the injunction. 59 U.S. (18 How.) at 425-27. This Court denied that request, holding that the new statute "afforded full authority to the [company] to reconstruct the bridge" and that the Court's prior decree "could not, therefore, be carried into execution after the enactment of this law." *Id.* at 436. The Court rejected Pennsylvania's contention that the statute interfered with the Court's authority by "annul[ling] the judgment of the court already rendered." *Id.* at 431. The statute merely changed the underlying law, and that change compelled a different result in the litigation in which the bridge's legality would be definitively adjudicated: "There [was] no longer any interference with the enjoyment" of the right to free navigation "inconsistent with law" because "this right ha[d] been modified by the competent authority," *i.e.*, Congress, "so that the bridge is no longer an unlawful obstruction," and the prior injunction "c[ould]not be enforced." *Id.* at 432.

ii. *Robertson*, 503 U.S. 429, similarly upheld a statute designed to resolve specific pending litigation, which identified the cases by caption and docket number. *Id.* at 435, 437-41. *Robertson* arose from several consolidated suits challenging federal policies governing timber harvesting and sales in certain federal forests as contrary to five federal statutes. *Id.* at 432-33. "In response to this ongoing litigation," Congress enacted an appropriations rider "establish[ing] a comprehensive set of rules to govern

[timber] harvesting within a geographically and temporally limited domain." *Id.* at 433. The statute "applied only to" thirteen specific forests. *Ibid.* And by its terms, the statute "expired automatically" less than one year after its enactment. *Ibid.*

That new statute spoke directly to the dispute in the litigation. While allowing limited sales of timber from the forests at issue, Section 318(b)(3) and (b)(5) of the law prohibited any harvesting from specific designated areas until the statute expired. *See* Pub. L. No. 101-121, § 318(b)(3), (b)(5), 103 Stat. 701, 745-47 (1989). A further provision, Section 318(b)(6)(A), "determine[d] and direct[ed] that" compliance with subsections (b)(3) and (b)(5) in the specific forests disputed in the litigation "is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases," citing the cases by name and docket number. *Id.* § 318(b)(6)(A). The plaintiffs challenged this provision as a violation of Article III, and the Ninth Circuit held it unconstitutional. 503 U.S. at 435-36.

This Court unanimously reversed, rejecting the plaintiffs' separation-of-powers challenge. 503 U.S. at 437-41. The statute, *Robertson* held, did not usurp federal courts' role by "directing particular applications of either the old or the new standards," but instead "replaced the legal standards underlying the two original challenges" with those set forth in the new statute. *Id.* at 437. "Before subsection (b)(6)(A) was enacted, the original claims would fail only if the challenged harvesting violated none of five old provisions," but "[u]nder subsection (b)(6)(A), ... those same claims would fail if the harvesting violated neither of two new provisions." *Id.* at 438. Congress

had left application of the new standards to the courts. *Ibid.*

It made no difference, *Robertson* held, that the new statute "deemed compliance with new requirements to 'meet' the old requirements," rather than expressly modifying or superseding the old requirements. 503 U.S. at 439 (brackets omitted). Congress's enactment of a statute deeming compliance with new standards "to constitute compliance" with existing law *necessarily* amounted to a "'modification'" of that existing law "through operation of the canon that specific provisions qualify general ones." *Id.* at 440. Congress's "intent to modify" the law was sufficiently "clear" and "express" even to overcome the presumption against implied repeals. *Ibid.* Even if the new statute were ambiguous, moreover, the Court held that it would be "obliged" by the constitutional-avoidance canon to construe it to "modif[y] previously existing law." *Id.* at 441.

Petitioner asserts (at 38) that the statute in *Robertson* referred to the particular cases only to identify the statutory requirements the new statute superseded. But Congress sought to identify those requirements because they were "*the basis for* the consolidated cases." Pub. L. No. 101-121, § 318(b)(6)(A) (emphasis added). Congress plainly was targeting those suits; the statute applied only to the specific *forests* disputed in those suits, and only for a specific *year*. *See ibid.*

iii. *Plaut*, 514 U.S. 211, rejected a claim that a statute violated the separation of powers because it directed the result in particular cases. *Id.* at 218. In *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), this Court had held that private claims under Section 10(b) of the Securities

Exchange Act of 1934, 15 U.S.C. § 78j(b), are time-barred unless "commenced within one year after the discovery of the facts constituting the violation and within three years after such violation." 501 U.S. at 364. Six months later, Congress enacted a new statute, 15 U.S.C. § 78aa–1, modifying those time bars retroactively. The new statute superseded *Lampf*'s holding regarding the time bar for Section 10(b) suits pending when *Lampf* was decided by reinstating "the laws applicable in the jurisdiction ... as such laws existed" before *Lampf*. *Id.* § 78aa–1(a). A separate subsection—the provision challenged in *Plaut*—provided that cases pending when *Lampf* was decided that were later "dismissed as time barred" could be "reinstated" by motion if they "would have been timely filed" under pre-*Lampf* law, even if the dismissal had become final. *Id.* § 78aa–1(b).

The defendants in *Plaut* had secured a judgment in a Section 10(b) suit commenced prior to *Lampf* that was untimely under that precedent; the plaintiffs did not timely appeal, and the judgment became final. 514 U.S. at 213-14. After the statute's enactment, the plaintiffs moved to reinstate their suit. *Id.* at 215. Like petitioner here, the defendants argued that the new law violated the separation of powers under *Klein* by "direct[ing] a particular rule of decision to adjudicate private rights in pending Article III cases." Resp. Br. 27-28, *Plaut*, No. 93-1121 (Sept. 9, 1994), 1994 WL 496344 (citing *Klein*, 80 U.S. (13 Wall.) 128, and *Robertson*, 503 U.S. 429).

This Court rejected that challenge. 514 U.S. at 218. It acknowledged that, in *Klein*, it had "refused to give effect to a statute that was said 'to prescribe rules of decision to the Judicial Department of the government in cases pending before it.'" *Ibid.* (cita-

tion and brackets omitted). But *Plaut* held that this "prohibition does not take hold when Congress 'amends applicable law.'" *Ibid.* (citation and brackets omitted). Because "Section 27A(b) indisputably d[id] set out substantive legal standards for the Judiciary to apply," it did "in that sense chang[e] the law (even if solely retroactively)." *Ibid.* The statute thus did not "offend" the "previously established prohibitio[n]" on "'prescrib[ing] rules of decision to the Judicial Department'"—even though the law worked an outcome-determinative change in a limited number of cases. *Ibid.* (citation omitted).

Petitioner (at 49) writes off *Plaut*'s rejection of that separation-of-powers challenge as "dicta" because the Court went on to hold that the statute violated Article III for a different reason: It "retroactively command[ed] the federal courts to reopen final judgments," which infringed the Judiciary's authority "'to render dispositive judgments'" not subject to revision—authority which *Plaut* concluded was inherent in the Constitution's grant of the "'judicial Power'" to the courts that it created. 514 U.S. at 219 (citation omitted). But *Plaut* held the law invalid on that basis only *after* rejecting the defendants' argument that the statute was invalid under *Klein* because it directed the result in specific cases. *Id.* at 218. Indeed, the distinction *Plaut* drew between still-pending cases and completed judicial determinations only underscores that Congress may alter the law governing specific disputes *until* the Judicial Department has rendered final judgment. *See also McCullough* v. *Virginia*, 172 U.S. 102, 123-24 ("[l]egislation may act on subsequent proceedings, may abate actions pending," and "the power of the legislature to disturb the rights created ... ceases"

only "when those actions have passed into judgment").

2. *Klein* Confirms That Congress Can Enact Statutes That Affect The Result In Specific Cases If It Can And Does Change The Law.

Petitioner and its *amici* strain to distill a contrary rule from *Klein*, 80 U.S. (13 Wall.) 128, contending that, "[w]hatever the scope of *Klein*," it forbids laws like Section 8772. Pet. Br. 21, 43-45, 49-50; Professors Br. 4-19. But they misread *Klein* and later cases, which have "'made clear" that, "'[w]hatever the precise scope of *Klein*,'" it is inapplicable "'when Congress "amends applicable law."'" *Miller* v. *French*, 530 U.S. 327, 349 (2000) (brackets omitted) (quoting *Plaut*, 514 U.S. at 218, in turn quoting *Robertson*, 503 U.S. at 441). Properly understood, *Klein* merely recognized the corollary that, where Congress does *not* change the applicable legal standards—including because, as in *Klein* itself, Congress *cannot* do so—Congress also may not dictate how Article III courts must decide cases governed by those standards.

The core issue in *Klein* was the effect of a presidential pardon on the rights of alleged Confederate supporters to reclaim property taken by Union forces in the Civil War. From 1861 to 1863, Congress passed several statutes addressing confiscation of Confederate supporters' property. 80 U.S. (13 Wall.) at 130. An 1862 statute authorized seizure and divestiture of property of persons who engaged in or aided the rebellion, but authorized the President to grant pardons and amnesty. *Id.* at 130-31 (citing Act of July 17, 1862, ch. 195, 12 Stat. 589). An 1863 law allowed Union agents to take possession of property captured (or found abandoned) by Union forces, but

allowed the owner to petition the Court of Claims to have the property (or proceeds from its sale) restored, if he proved "'that he ha[d] never given any aid or comfort to the present rebellion.'" *Id.* at 131 (quoting Act of Mar. 12, 1863, ch. 120, 12 Stat. 820).

On December 8, 1863, President Lincoln issued an Amnesty Proclamation offering a "full pardon," including restoration of property rights, with certain exceptions, to those who had previously aided the Confederacy but later swore an oath of loyalty to the Union. 80 U.S. (13 Wall.) at 131-32. The Proclamation was not premised on the 1862 statute authorizing pardons; rather, Lincoln "emphasized ... that he possessed the authority 'to grant or withhold a pardon at his own absolute discretion.'" Amanda L. Tyler, *The Story of* Klein*: The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts*, in *Federal Courts Stories* 87, 90 (Vicki Jackson & Judith Resnik eds., 2010) (quoting Abraham Lincoln, Message to Congress (Dec. 8, 1863)).

Klein arose from an action in the Court of Claims to restore property taken from an alleged Confederate supporter, V.F Wilson, who had accepted a pardon under the Proclamation. 80 U.S. (13 Wall.) at 132. The Court of Claims held that Wilson's estate was entitled to return of his property, and the government appealed to this Court. *Ibid.* While that appeal was pending, this Court decided *United States* v. *Padelford*, 76 U.S. (9 Wall.) 531 (1870), which held—relying on an earlier decision establishing that "the effect of a pardon" is "'that in the eye of the law the offender is as innocent as if he had never committed the offence'"—that one who accepted a pardon under the Proclamation was "purged of whatever offence against the laws of the United

States he had committed," "relieved from any penalty which he might have incurred," and entitled to restoration of property taken based on the pardoned offense. *Id.* at 542-43 (quoting *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1867)).

Less than three months after *Padelford*, Congress enacted an appropriations rider addressing the effect of pardons on claims to restore seized property. 80 U.S. (13 Wall.) at 133-34. The statute provided that no pardon "'shall be admissible in evidence'" to support a claim in the Court of Claims against the government; that no pardon previously "'put in evidence'" could "'be used or considered by'" that court or an "'appellate court'" to "'sustain the claim'"; that a person's acceptance of a pardon *without* protesting his innocence would constitute "'conclusive evidence'" that the person *did* support the Confederacy; and that, in any case where the Court of Claims had already entered judgment for a claimant based upon a pardon, this Court "'shall ... have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction.'" *Ibid.* (quoting Act of July 12, 1870, ch. 251, 16 Stat. 235, 230).

Citing the 1870 statute, the government moved to remand *Klein* with instructions to dismiss. 80 U.S. (13 Wall.) at 134. This Court denied the motion, holding that the 1870 statute violated the separation of powers by "prescrib[ing] rules of decision to the Judicial Department of the government in cases pending before it," and by "infringing" the President's pardon power. *Id.* at 146-47 The law, moreover, was an attempt by "one party to the controversy to decide it in its own favor." *Id.* at 146.

Although *Klein* held the statute unconstitutional, the Court's opinion confirmed that, so long as Con-

gress otherwise acts within its authority, it *can* modify the law applicable to individual claims or property. *Klein* did not overturn, but distinguished, the Court's decision in *Wheeling Bridge* that had reached exactly that conclusion: As *Klein* explained, in *Wheeling Bridge*, "Congress passed an act legalizing the [bridge] and making it a post-road," and the Court "held that the bridge had ceased to be a nuisance by the exercise of the constitutional powers of Congress." 80 U.S. (13 Wall.) at 146-47 There was nothing improper about that law, *Klein* explained, even though its purpose and effect were to yield a particular result. The law did not "prescrib[e]" an "arbitrary rule of decision" for courts to apply, but instead "created" "new circumstances," and left "the court ... to apply its ordinary rules to th[ose] new circumstances." *Ibid.*

In contrast, *Klein* invalidated the law at issue because Congress attempted to direct a result *without* modifying the legal standards that federal courts would apply—because Congress *could not* alter those legal standards. The statute at issue in *Klein* purported to alter the legal consequences and evidentiary significance of a presidential pardon. But, as *Klein* recounted, this Court had already held that "the President's power of pardon 'is not subject to legislation'" and "that 'Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders.'" 80 U.S. (13 Wall.) at 141 (quoting *Garland*, 71 U.S. (4 Wall.) at 380). It thus was clear that Congress *had not* changed the law because Congress was constitutionally *unable* to do so. Unlike *Wheeling Bridge*, there were "no new circumstances ... created by legislation" (*id.* at 147) because Congress had no authority to create any.

Because Congress could not (and thus did not) change the applicable law, *Klein* recognized, Congress could not direct this Court to decide a case governed by that law in a way contrary to the Court's own judgment. *See* 80 U.S. (13 Wall.) at 146-47 The Court was "bound" to decide disputes in accord with the Constitution, U.S. Const. art. VI, cl. 2, and as *Klein* explained, the Court had already held in *Padelford*, as a matter of constitutional law, that a pardon under the Proclamation entitled claimants to restoration of their property. *See* 80 U.S. (13 Wall.) at 138-39. Congress could not overturn *Padelford*, and it was thus a transgression of "the limit which separates the legislative from the judicial power" for Congress to direct the Court to disregard *Padelford* by giving a pardon an effect different from (indeed, antithetical to) the effect this Court had held the Constitution required. *Id.* at 147 Congress, in other words, could not *evade* a constitutional limitation on its authority by directing courts to decide cases involving pardons in a particular way *regardless* of the applicable law.

Klein thus stands for the unremarkable principle that Congress cannot direct the outcomes of cases, or direct courts what effect to give to particular evidence, *except* by enacting laws otherwise within its constitutional authority. If enacting a law would exceed Congress's enumerated powers, violate an external constitutional constraint on its authority (*e.g.*, the First Amendment or Due Process Clause), or impermissibly infringe the authority of another Branch, Congress cannot achieve the same result indirectly by instructing courts to reach the same outcome—or forcing them to do so, by manipulating their jurisdiction, or requiring them to give a particular effect to certain evidence. In all events, "[w]hatever the pre-

cise scope of *Klein*, ... its prohibition does not take hold when Congress 'amend[s] applicable law.'" *Plaut*, 541 U.S. at 218 (quoting *Robertson*, 503 U.S. at 441).

Petitioner resists this understanding of *Klein*, deriding its distinction between statutes that amend the law and those that dictate a result *without* amending the law as "incoherent" and "mak[ing] no sense." Pet. Br. 50. This Court need not and should not entertain that contention, which contradicts petitioner's own position below that laws comport with *Klein* if they "merely 'chang[e] the law applicable to pending cases.'" Pet. C.A. Br. 48-49 (citation omitted); *cf. OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 397-98 (2015) (deeming forfeited argument not raised below). In any event, petitioner's new claim is not an interpretation of *Klein*, but a direct attack upon it. The Court has described *Klein's* holding in precisely that manner in *Robertson*, *Plaut*, and *Miller*. Moreover, understood in the context of the circumstances *Klein* confronted, *Klein*'s distinction makes perfect sense. *See* Tyler, *supra*, at 108-10. This principle was so readily apparent to the Court that it presumed that Congress's error in violating it must have been "inadverten[t]." 80 U.S. (13 Wall.) at 147.

3. Section 8772 Validly Amends The Law Applicable To Respondents' Claims Regarding Issues Within Congress's Legislative Authority.

Like other statutes this Court has upheld, Section 8772 is fully consistent with the constitutional structure because it changed the underlying law applicable to pending claims regarding subjects within Congress's authority.

a. Section 8772 indisputably changed the law in the relevant sense, *i.e.*, it "set out substantive legal standards for the Judiciary to apply." *Plaut*, 514 U.S. at 218. Petitioner concedes that Section 8772 modified existing legal standards. Pet. Br. 27-28, 51-52. Section 8772 establishes new standards permitting execution by judgment-holders against particular assets of Iran and its instrumentalities in cases that are (or become) consolidated with this action. It expressly abrogates foreign sovereign immunity from execution to the extent that it would otherwise apply under the FSIA. 22 U.S.C. § 8772(a)(1). And it explicitly "preempt[s] any inconsistent provision of State law," including provisions of the Uniform Commercial Code ("U.C.C.") that petitioner claims would otherwise preclude execution here. *Ibid.*; *see also* Pet. Br. 4-5, 26-27. Section 8772 thus does not attempt to change the outcome of cases *without* altering the law, but modifies the legal standards themselves.

Indeed, Section 8772 is even more clearly constitutional than the statute upheld in *Robertson*. That statute did not in so many words modify existing standards, but *deemed* certain circumstances "'adequate'" to "'mee[t]'" *existing* "'statutory requirements.'" 503 U.S. at 435 (citation omitted). Yet the Court recognized that the statute amended existing law because its "operation" was to "modif[y] the old [statutory] provisions" to a limited extent. *Id.* at 438; *see also id.* at 439-40. Section 8772 says nothing about satisfying existing standards, and explicitly establishes new rules that apply "notwithstanding" other law and "preemp[t]" inconsistent state law. Were there any doubt that Section 8772 changes the law, such doubt would have to be resolved in favor of Section 8772's constitutionality, by construing it to

change the law rather than to dictate outcomes without altering legal standards. *See id.* at 441.[4]

b. Section 8772 also addresses subjects on which Congress plainly *could* change the underlying law: federal courts' jurisdiction and procedure generally, and the availability of foreign-state property for execution specifically—matters on which Congress's authority is near its apex.

Congress unquestionably "has the constitutional authority to define the jurisdiction of the lower federal courts." *Keene Corp.* v. *United States*, 508 U.S. 200, 207 (1993). Article III authorizes Congress—and "[o]nly Congress," *Kontrick* v. *Ryan*, 540 U.S. 443, 452 (2004)—to "ordain and establish" inferior courts. U.S. Const. art. III, § 1. Within the "boundaries fixed by the Constitution," Congress's power is plenary. *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 234 (1922). Congress likewise "has the power to prescribe rules of procedure for the federal courts," *Palermo* v. *United States*, 360 U.S. 343, 353 n.11 (1959)—including "the uncontrolled power to legislate in respect both to the form and effect of executions and other final process," *Riggs* v. *Johnson Cnty.*, 73 U.S. (6 Wall.) 166, 187-88 (1867).

Petitioner stresses that Section 8772 displaces state law concerning what property is subject to execution. Pet. Br. 5, 12, 26. But state law is pertinent

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[4] As explained in Part II, *infra*, respondents are independently entitled to execution under TRIA Section 201(a). But while Section 8772 yields the same *result* here, it nevertheless changes the law in the relevant sense because it establishes different standards and requires plaintiffs to prove different factual predicates to execution. *Supra* p. 10.

to execution of federal-court judgments only because the Federal Rules, promulgated under authority delegated by Congress, 28 U.S.C. § 2072, make it so. *See* Fed. R. Civ. P 69(a)(1). Congress is perfectly free to depart from that default rule—in all cases or certain categories—which is what both the FSIA and Section 8772 do.

Congress's power over these matters, and its authority to tailor federal policy for specific disputes, is at its most expansive in the context of foreign sovereign immunity. *See Verlinden*, 461 U.S. at 486, 493. Decisions whether to extend immunity from suit or execution have always been the domain of the political Branches—and historically were often made on a case-by-case basis. *See id.* at 486-87. In the FSIA, Congress occupied the field, *see NML*, 134 S. Ct. at 2255, and in the original FSIA and since Congress has fashioned a variety of rules and exceptions to govern specific circumstances—including enforcement of judgments arising from state-sponsored terrorism. *Supra* pp. 5-7. Through these enactments, the political Branches—which share responsibility for conducting the Nation's foreign affairs—have sought to redress and deter, in a particularized way, state sponsorship of terrorist acts.

Section 8772 is an exercise of Congress's power over all of these subjects. In contrast to the statute in *Klein*—which purported to direct how courts would decide an issue (the legal effect of pardons) over which Congress *lacked* authority—Section 8772, therefore, is not an impermissible end-run around constitutional strictures on Congress's authority. The rules governing execution against foreign states' assets to satisfy federal-court judgments are Congress's to make. That is all Section 8772 does.

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Section 8772, in short, is fully consistent with the separation of powers because it merely changes the legal standards applicable to pending cases regarding matters within Congress's power. Just as the constitutional structure did not bar Congress from legislating as to one bridge, *Wheeling Bridge*, 59 U.S. (18 How.) at 431-32, specific forests, *Robertson*, 503 U.S. at 437-41, or a finite group of cases, *Plaut*, 514 U.S. at 218—even in ways that would directly affect the outcome of specific cases—nothing in the Constitution prevented Congress from tailoring Section 8772 to particular assets that were at the fore of its policy concern: assisting victims of terrorist attacks in their efforts to satisfy judgments against Iran, which sponsored those attacks but has defiantly refused to pay those judgments.

B. Petitioner's Invented Limitations On Congress's Authority Have No Basis In The Constitution Or Precedent.

Petitioner nevertheless urges the Court to invalidate Section 8772, contending that it contravenes two purported, unwritten limitations on Congress's authority: Congress, petitioner claims, cannot "change the law solely for a single pending case" or enact laws that "effectively dictat[e] the outcome of" specific cases. Pet. Br. 22, 42 (capitalization omitted). Petitioner forfeited the former argument by not presenting it to the court of appeals. Neither made-to-order exception, moreover, has any basis in this Court's case law or the constitutional structure, and each is arbitrary and unworkable. Even if either were meritorious, neither would apply to Section 8772.

1. Petitioner's "Single Pending Case" Exception Is Baseless And Inapplicable To Section 8772.

Petitioner's primary submission is that the Constitution forbids Congress from modifying the law solely for purposes of a "single pending case." Pet. Br. 22-42. The Court should not entertain that contention because petitioner did not present it to the court of appeals. *See OBB*, 136 S. Ct. at 397-98. In any event, that contrived limitation has no footing in the Constitution or this Court's precedent and would be hopelessly impractical in application. Moreover, by any plausible measure, Section 8772 does *not* change the law for a "single pending case." It prescribes standards governing more than 1,000 victims' claims in multiple separate actions that were consolidated for administrative convenience, as well as claims asserted by additional respondents who joined the proceedings after Section 8772's enactment.

a. Petitioner cites no decision of this Court supporting its invented single-pending-case exception. Petitioner does not pretend that its lead case, *Klein*, supports its theory. And for good reason: The Court in *Klein* did *not* invalidate the statute at issue in that case on the ground that it was targeted at just one case. *See generally* 80 U.S. (13 Wall.) at 145-48. Nor could it have done so. The statute applied to *any* case brought in the Court of Claims involving a pardon. *See id.* at 133-34.

This Court's decisions before and since *Klein* contradict petitioner's single-pending-case theory. *Wheeling Bridge* upheld a statute that was plainly directed at a single action: the proceedings to enforce this Court's prior decree requiring modification or abatement of a specific bridge. 59 U.S. (18 How.)

at 431-32. Petitioner contends that the statute in *Wheeling Bridge* reached more broadly than a single case because a hypothetical future plaintiff might conceivably have filed a subsequent suit seeking the same relief. Pet. Br. 36. But once the bridge's legality was definitively resolved in the suit seeking to enforce the injunction, there would be no need to reapply the law in any future lawsuit.

Plaut specifically rejected the view that a statute's breadth bears on whether it infringes the judicial power. 514 U.S. at 239. The Court explained that "laws that impose a duty or liability upon a single individual or firm are not on that account invalid," and reiterated the Court's earlier holding that "Congress may legislate 'a legitimate class of one.'" *Id.* at 239 n.9 (quoting *Nixon* v. *Adm'r of Gen. Servs.*, 433 U.S. 425, 472 (1977)). *Plaut* made clear that it did not matter that the statute at issue "reopen[ed] ... final judgments in a whole class of cases rather than in a particular suit," and that "[i]t makes no difference whatever to that separation-of-powers violation that it is in gross rather than particularized." *Id.* at 227-28, 238-39; *see also id.* at 248 (Stevens, J., dissenting). Petitioner (at 39-40) dismisses this aspect of *Plaut* as confined to Congress's effort to overturn a final federal-court judgment, but that reading is far too narrow. *Plaut* rejected the concurrence's premise that the enactment of "particularized" legislation is necessarily "nonlegislative," stressing that rules of general applicability are "by no means [legislatures'] only legitimate mode of action." *Plaut*, 514 U.S. at 239 & n.9. If the statute's breadth cannot save it from intruding on the Judiciary's role, neither can the narrowness of a law that does not otherwise infringe the judicial power invalidate it.

Petitioner offers a handful of 18th and 19th century cases purportedly suggesting that legislatures may *only* enact laws of general applicability, Pet. Br. 24, 30-32, but none supports petitioner's position. Nearly all concern the structure of *state* governments and attempts to interfere with state courts' judgments. *See ibid.* And most of the laws that those cases struck down attempted to reopen final judgments—the challenge sustained in *Plaut*—*not* laws like Section 8772 that affect *pending* cases. In *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798), for instance, the Connecticut Legislature passed a law setting aside a prior state-court decree. *Lewis* v. *Webb*, 3 Me. 326 (1825), held invalid a law granting a new right to appeal "long after the time allowed by law to claim an appeal had elapsed" and the case was "finally decided." *Id.* at 327, 332, 335; *see also Merrill* v. *Sherburne*, 1 N.H. 199, 202-03 (1818) (law granting new trial "from a final and absolute judgment"); *Appeal of Baggs*, 43 Pa. 512, 514 (1862) (law reviving claim presented "eleven years after the estate had been distributed and finally settled by the decree of the court"); *Tate's Ex'rs* v. *Bell*, 12 Tenn. (4 Yer.) 202, 207 (1833) (law "reviv[ing] the judgment"). None overrides the decisions of this Court that recognize that Congress may enact particularized laws that alter the standards applicable to pending litigation.[5]

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[5] Petitioner's other early authorities dealt with even further-removed concerns. *See Jones' Heirs* v. *Perry*, 18 Tenn. (10 Yer.) 59 (1836) (law extending expired limitations period for particular person); *Holden* v. *James*, 11 Mass. (11 Tyng) 396 (1814) (same); *Reiser* v. *William Tell Saving Fund Ass'n*, 39 Pa. 137 (1861) (law retroactively overriding court's interpretation of statute); *O'Conner* v. *Warner*, 4 Watts & Serg. 223 (Pa. 1842) (same).

b. Petitioner's single-pending-case exception also is meritless as an original matter. Petitioner points to nothing in the Constitution itself that supports its theory, and indeed it is irreconcilable with the constitutional structure and history.

i. The Framers' establishment of specific, carefully calibrated checks on each Branch's power—including, as relevant here, provisions that address when Congress may enact retroactive or particularized legislation, such as the Bill of Attainder or *Ex Post Facto* Clauses—counsels *against* inventing additional, amorphous limitations that address the same issues but are unmoored from the Constitution's text. *Supra* pp. 17-19; *cf. Plaut*, 514 U.S. at 239 n.9. The same principle dooms petitioner's effort to ground its single-pending-case limitation in Article III's grant of "'the judicial power.'" Pet. Br. 22 (brackets and citation omitted). As this Court has recognized, where a particular constitutional provision speaks to an issue, courts should not resort to "more generalized" provisions in search of a different answer. *Graham* v. *Connor*, 490 U.S. 386, 395 (1989) ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."); *see also, e.g.*, *Whitley* v. *Albers*,

475 U.S. 312, 327 (1986) (same regarding Eighth Amendment).[6]

Petitioner rejoins that "the mere existence of" such specific checks does not "imply that any legislation not running afoul of that clause is *automatically* constitutional." Pet. Br. 41 (emphasis added). That is beside the point. A law that does not constitute a prohibited bill of attainder may still, for example, exceed Congress's authority under the Commerce Clause. But it is inconsistent with the constitutional structure to invent limitations that invalidate statutes for the *same reasons* as specific, enumerated provisions yet according to *different standards* than the Constitution establishes.

ii. Petitioner appeals (at 32-35) to historical legislative practice as purportedly supporting its narrow conception of legislative power. But history only

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[6] As the case comes to this Court, there is no suggestion that Section 8772 violates the Bill of Attainder, *Ex Post Facto*, Due Process, or Equal Protection Clauses, or any other enumerated constitutional constraint, by dint of its effect on pending claims concerning particular property. And Section 8772 does not attempt to overturn any final federal-court judgment. *Cf. Plaut*, 514 U.S. at 219-240. Petitioner did argue below that Section 8772 violates the Takings Clause, but the court of appeals rejected that claim, Pet. App. 10a-11a, and petitioner does not renew it here. Petitioner also argued that Section 8772 is invalid because it abrogates the Treaty of Amity, but as the Second Circuit held, that is incorrect and irrelevant to Section 8772's *validity*. *Id.* at 6a-7a. Congress is free to abrogate treaties, *see Breard* v. *Greene*, 523 U.S. 371, 376 (1998) (per curiam), and Section 8772(a)'s "notwithstanding" clause clearly supersedes any inconsistent treaty provisions, *see Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10, 18 (1993).

further undermines petitioner's contention that Congress cannot legislate as to a single pending case.

Petitioner does not dispute the prevalence or validity of private bills, which by definition affect only one or a few parties and claims, *supra* p. 19, and which "are still common" today, *Plaut*, 514 U.S. at 239 n.9. Petitioner argues instead that private bills, and most other particularized legislation, historically concerned only disputes over "public rights," such as "claims against the government." Pet. Br. 33, 41. That is incorrect. Private bills often addressed rights of private persons *inter se*. For example, Congress enacted private bills that "restored the copyrights of works that previously had been in the public domain," *Golan* v. *Holder*, 132 S. Ct. 873, 886 (2012), or that conferred patents.[7] Both types of bills governed rights to exclude other private persons from the use of the protected works or inventions. Congress also enacted, and this Court upheld, at least one private bill concerning a private employee's worker's compensation claim against his employer. *See Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370, 374-77, 381 & n.25 (1940) (ordering administrative agency to conduct further review of its prior decision on employee's claim for compensation for work-related injury, and to issue a new decision). In any event, Section 8772 concerns public rights to the same degree as the examples petitioner cites: Acts of state-sponsored terrorism are public acts, and Congress's decision to

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[7] *See, e.g.*, Act of Feb. 17, 1898, ch. 29, 30 Stat. 1396; Act of June 11, 1878, ch. 187, 20 Stat. 542; Act of May 30, 1862, ch. 88, 12 Stat. 904; Act of Feb. 19, 1849, ch. 57, 9 Stat. 763; Act of Mar. 3, 1843, ch. 131, 6 Stat. 895; Act of June 30, 1834, ch. 213, 6 Stat. 589.

make available to victims of such acts new means of satisfying judgments against the foreign state implicates "public rights" no less than if the United States had elected to pay the judgment itself.

Petitioner claims that Congress has not previously enacted particularized legislation designed to govern specific *pending* cases. Pet. Br. 32-35, 40. That claim, too, is untrue. Indeed, petitioner concedes (at 16) that the statute in *Robertson* was "passed to resolve two environmental suits" that were still pending, which the statute identified by caption and docket number. *See* 503 U.S. at 435. The law in *Robertson* that "deemed" certain legal requirements to be satisfied for purposes of particular cases, notably, is not unique. Congress has enacted a number of statutes that settled specific suits pending in federal courts against States involving Native American land transfers—identifying the cases by name and docket number and providing that the transfers "shall be deemed to have been made in accordance with the Constitution and" other applicable federal law. 25 U.S.C. § 1705(a)(1); *see id.* §§ 1701-1702; *see also, e.g., id.* §§ 1721-1722, 1723(a)(1), 1741-1742, 1744(a)(2), 1751-1752, 1753(a), 1771, 1771b(a).

Similarly, the statute in *Wheeling Bridge*, 59 U.S. (18 How.) 421—a "continuation of the suit" previously brought to this Court, *ibid.* (citing 54 U.S. (13 How.) 518)—was tailored to resolve that specific dispute by eliminating the legal basis of an existing injunction. *See* 59 U.S. (18 How.) at 429. And *Landgraf* discussed a statute that contained an exception "intended to exempt a single disparate impact lawsuit" from an otherwise-applicable new legal standard. 511 U.S. at 258; *see also Antonio* v. *Wards Cove Packing Co.*, 10 F.3d 1485, 1492 (9th Cir. 1993) (re-

jecting separation-of-powers challenge to same statute); *Me. Cent. R.R. Co.* v. *Bhd. of Maint. of Way Emps.*, 835 F.2d 368, 369-73 (1st Cir. 1987) (upholding statute enacted to "resolve a labor dispute" between a railroad and its workers).

Congress also has enacted—and courts have upheld—statutes that targeted a specific, finite *set* of claims. The statute at issue in *Plaut*, for instance, also contained a provision (not challenged in this Court) changing the limitations period applicable to the closed universe of cases that were pending when *Lampf* was decided and had *not* yet been dismissed. *See* 514 U.S. at 214-15; 15 U.S.C. § 78aa–1(a). Lower courts rejected separation-of-powers challenges to that provision. *See Axel Johnson Inc.* v. *Arthur Andersen & Co.*, 6 F.3d 78, 82 (2d Cir. 1993); *Gray* v. *First Winthrop Corp.*, 989 F.2d 1564, 1570 (9th Cir. 1993). More recently, in 2005, Congress enacted the Protection of Lawful Commerce in Arms Act, which directed courts to dismiss certain suits against gun manufacturers that were pending on the date of the statute's enactment—necessarily a finite set of cases. *See* 15 U.S.C. §§ 7902(b), 7903(5). Courts have upheld this law as well. *City of New York* v. *Beretta U.S.A. Corp.*, 524 F.3d 384, 396 (2d Cir. 2008); *Ileto* v. *Glock, Inc.*, 565 F.3d 1126, 1139-40 (9th Cir. 2009).

Petitioner dismisses these statutes that address categories of cases because (it says) they were "generally applicable legislation that was merely alleged to have been enacted for the purpose of affecting specific litigation." Pet. Br. 33 (emphasis omitted). But petitioner fails to explain how laws that target a fixed, finite, and known set of pending cases are meaningfully different from laws that enumerate each case by name and docket number; both apply

only to particular disputes and have "prospective effect" to the same extent. *Id.* at 17 Treating the two categories differently amounts to a meaningless "drafting rule" of the very type petitioner elsewhere decries. *Id.* at 50.

iii. Petitioner's attempt to distinguish statutes affecting a *single* case from those affecting a small, defined *category* of cases highlights the arbitrariness of its theory. Petitioner has admitted that "Congress can unquestionably enact legislation directed to a specific problem, party, or property," Pet. Cert. Supp. Br. 5—and that the mere fact that a statute "address[es] a specific person or problem" does not render it "unconstitutional," Pet. Br. 25; *see also* Pet. Cert. Reply 4. And petitioner does not dispute that Congress may enact laws that affect pending litigation. Petitioner claims that Congress violates the Constitution only if it does *both at once*, legislating as to one pending *case*. Pet. Br. 2, 17-19, 21-22, 25-28, 32, 35-36.

That limitation is utterly illogical. If Congress, as petitioner concedes, can prescribe law as to one piece of property or one pair of parties, it makes no sense to say that Congress's power evaporates the moment a complaint is filed in federal court. That would enable individual litigants to eviscerate Congress's authority by preemptively filing suits to scupper pending legislation.

Conversely, if Congress can change the law applicable to many pending cases, there is no principled basis to bar it from doing the same in a smaller number of suits. Within the Constitution's express limitations, the wisdom of legislating as to one claim or parcel instead of 100 is entirely the province of the People's representatives. Indeed, claims related to a

single piece of property, or even a single party's liability from one event or course of conduct, are often adjudicated in one case under various procedural mechanisms, such as the Federal Rules' joinder and class-action provisions, *see, e.g.*, Fed. R. Civ. P 19, 23, and the "first-to-file" rule, *see, e.g.*, *Cadle Co.* v. *Whataburger of Alice, Inc.*, 174 F.3d 599, 606 (5th Cir. 1999). There is no reason why Congress's authority should depend on whether multiple claims, at a particular moment in time, have been consolidated for some or all purposes. Whether joinder, class certification, or consolidation is appropriate turns on factors that have nothing to do with Congress's authority. They are functions of the Federal Rules, which are creatures of Congress and subject to its authority, *see* 28 U.S.C. § 2072, not vice-versa. Procedures such as consolidation, moreover, do not fundamentally alter the individual character of the claims consolidated. *See, e.g.*, *Gelboim* v. *Bank of Am. Corp.*, 135 S. Ct. 897, 904 (2015) ("[c]ases consolidated for [multidistrict-litigation] pretrial proceedings ordinarily retain their separate identities").

c. Petitioner's illogical standard also would invite a raft of uncertainties and practical problems for which it offers no solution. Petitioner does not explain *what* (on its view) would count as a single pending case affected by legislation for purposes of its proposed exception. Would claims consolidated for *any* purpose forever constitute one case, or only claims joined for litigation on the merits? Must the case be *properly* pending in the forum where it was filed, or would even a case filed in a court lacking jurisdiction be sufficient to block Congress from legislating? What if Congress earnestly but mistakenly believes its enactment will affect multiple cases? Petitioner does not say.

Petitioner also does not explain *when* a case would have to be "pending" and constitute "one case" to bar legislation—the date a law is enacted, or when it takes effect? If claims that were consolidated when Congress enacts a law are later severed, would the statute spring back into force? What if the severed claims are reconsolidated? Petitioner never addresses the problems that its own theory would invite.

The People's representatives are entitled to know what laws are off-limits. As the party advocating a novel, unwritten exception to Congress's authority, petitioner bears the burden of demonstrating how Congress (and courts) will cope with it. It has not even tried.

d. Whatever answers petitioner might proffer to these questions, its single-pending-case criterion is inapplicable here. Section 8772 does *not* target a single suit between Jones and Smith; it applies to the "assets that are identified in and the subject of proceedings in" these now-consolidated actions. 22 U.S.C. § 8772(b). Petitioner stresses that Section 8772(c)(1) limits the statute's effect to these "'proceedings'" and that Section 8772 "has no effect on 'any *other* action.'" Pet. Br. 26, 39 (emphasis added) (quoting 22 U.S.C. § 8772(c)(1)). These "proceedings," however, consist of numerous claims by multiple groups of plaintiffs—more than 1,000 individuals altogether—who brought separate suits against Iran resulting in separate judgments, which they seek to enforce. 22 U.S.C. § 8772(b). No plausible definition of "one case" encompasses this vast array of independent claims by victims of separate acts of Iran-sponsored violence spanning decades.

Section 8772, moreover, was not limited to the claims for enforcement that were *already* part of the consolidated case when Section 8772 was enacted. The statutory text did not prevent additional claimants holding terrorism-based judgments against Iran from joining the action to pursue execution after Section 8772's enactment. Indeed, some did so: The respondents in *Wultz* v. *Islamic Republic of Iran*, 864 F Supp. 2d 24 (D.D.C. 2012), who had obtained a separate judgment against Iran, intervened in these proceedings to assert their own claim for execution in February 2013, D.C. Dkt. 329, 330 & Ex. A; D.C. Dkt. 398, at 5-13; Pet. App. 18a-19a, months *after* Section 8772's enactment, *see* Pub. L. No. 112-158, § 502.

Section 8772 thus was *not* confined to specific parties and claims already involved in this litigation. Pet. Br. 18, 21. And it *did* have a "meaningful prospective effect" by "chang[ing] the law ... for a class of circumstances," *id.* at 22—the claims of all who held terrorism-based judgments against Iran who sought (or would later seek) to enforce those judgments against particular assets by joining this consolidated litigation. Under any standard, Section 8772 comports with the separation of powers.

2. Petitioner's "Effectively Dictate The Outcome" Exception Is Also Meritless And Inapplicable.

Petitioner's alternative argument—that Congress cannot "effectively dictat[e] the outcome" of "specific" cases, Pet. Br. 42—is likewise unmoored from the Constitution and precedent and is equally opaque and unworkable. And this second exception similarly would not apply to Section 8772: As the district court recognized, the statute did *not* dictate

any findings or conclusions, but left application of the law's requirements to the courts. Pet. App. 115a. And it preserved courts' discretion to modify or vacate the underlying restraints.

a. Petitioner cannot point to any precedent of this Court forbidding legislation that "effectively dictates" (Pet. Br. 42) the outcome of cases. That is unsurprising. Congress can and often does enact laws that resolve the only issues disputed in given litigation. *Supra* pp. 19-20. The statutes in *Wheeling Bridge* and *Robertson* "effectively determined the ... outcome" (Pet. Br. 42) of the disputes they addressed by resolving a dispositive issue—in *Wheeling Bridge*, whether the bridge was a lawful structure, 59 U.S. (18 How.) at 429, and in *Robertson*, whether the statutory requirements "that [we]re the basis for the consolidated cases" were "m[et]," 503 U.S. at 435 (internal quotation marks omitted).

Petitioner invokes *Klein* (at 43-44) to support its dictate-the-outcome exception, but *Klein* established no such principle. The statute in *Klein* infringed the judicial power not because it left too little for courts to do, but because it attempted to direct the result *without* altering the legal standards governing the effect of a pardon—standards Congress was powerless to prescribe. *See* 80 U.S. (13 Wall.) at 146-47. Indeed, *Klein* acknowledged and distinguished *Wheeling Bridge*, where Congress had enacted a law that was outcome-determinative in the dispute. *Ibid.* This Court has rejected the view that a law violates *Klein* simply because it renders a claim "uncontested or incontestable" or makes calculation of damages "depen[d] upon a mathematical formula." *Pope*, 323 U.S. at 11.

Nor does anything in the Constitution's text or structure support petitioner's proposed free-floating bar on statutes that leave courts too little work to do. Subject to express limitations such as the Takings, Due Process, and Bill of Attainder Clauses, nothing prevents Congress from defining rights and causes of action as it sees fit—making the viability of certain claims clear-cut or conversely foreclosing claims altogether. Clarity in laws is ordinarily viewed as a virtue. It would be strange if a Constitution that forbids vague laws that "fai[l] to give ordinary people fair notice of the conduct" they cover and that "invit[e] arbitrary enforcement" (*Johnson* v. *United States*, 135 S. Ct. 2551, 2556 (2015)) contained an unstated limitation on laws that are *too* clear and whose application is *too* predictable.

b. Petitioner's dictate-the-outcome exception is also arbitrary and impractical. Petitioner offers no principled, workable rule to determine whether a statute goes beyond providing appropriate clarity to impermissibly foreordaining a result. At the certiorari stage, petitioner argued that a law is invalid if it leaves "no meaningful questions for judicial determination," Pet. Cert. Supp. Br. 2—a vacuous standard petitioner neither defined nor justified. Petitioner now abandons that empty label, but offers *no* rule in its place. It does not deny that Section 8772 requires *some* determinations by the court, and quibbles only over whether those determinations are sufficiently substantial. Pet. Br. 45-48. But it tenders no *test* the Court could apply to reach that conclusion. Congress and the courts need (and deserve) much better than petitioner's I-know-it-when-I-see-it standard. Such "vague distinctions" are anathema to the separation of powers. *Plaut*, 514 U.S. at 239.

Wherever the line is drawn, whether a statute has the effect of making the outcome of a particular case a "foregone conclusio[n]" (Pet. Br. 47) often cannot be known in the abstract, but frequently will depend on the facts and posture of the case. Petitioner's exception would mean that the constitutionality of an Act of Congress turns on whether parties in a particular case choose to dispute certain facts. A law cannot be valid in one suit but invalid in another based on the parties' tactical decisions.

c. Even if petitioner's dictate-the-outcome exception had merit, it would not invalidate Section 8772. Petitioner's attempt to analogize Section 8772 to a law unilaterally directing "'that a court must award Jones $35,000'" from Smith (Pet. Br. 25 (citation omitted)) grossly distorts the statute. Section 8772 does *not* impose liability on petitioner or its parent state. It permits victims of terrorist acts perpetrated or sponsored by Iran who *already* obtained valid, final judgments to seek satisfaction of those judgments from certain assets. 22 U.S.C. § 8772(a)(1).[8] Any immunity of property of foreign sovereigns to execution to satisfy federal-court judgments is purely a matter of legislative grace. Here, Congress further withdrew it by opening an alternative avenue for persons established to be Iran's victims to execute on property that ultimately belongs to Iran.

Section 8772, moreover, requires a court to make multiple additional determinations that (as the district court here found) give courts "plenty ... to adju-

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[8] Accordingly, three consolidated cases that had not yet obtained judgments were denied execution against the Iranian Assets by the district court. Pet. App. 19a-20a, 28a.

dicate." Pet. App. 115a. A court must find that the asset against which plaintiffs seek to execute is a "blocked asset" being "held in the United States for a foreign securities intermediary doing business in the United States" that is "equal in value to a financial asset of Iran" that the "intermediary or a related intermediary holds abroad." 22 U.S.C. § 8772(a)(1). While the statute is *limited* to the Iranian Assets disputed here, *id.* § 8772(a)(1)(B), (b), a court still must find that the assets meet the above criteria. And, as the district court explained, under Section 8772(a)(2), a court must further determine "whether and to what extent Iran has a beneficial or equitable interest in the assets at issue," and "whether constitutionally-protected interest holders *other than* Iran are present." Pet. App. 115a.

Petitioner dismisses these determinations (at 46) as "makeweights." But the district court—which was tasked with making the requisite findings—disagreed: "These determinations," it stressed, "are not mere fig leaves," for "it is quite possible that the Court could have found that defendants raised a triable issue" on them. Pet. App. 115a. Petitioner's contrary portrayal distorts the findings the statute required. Section 8772 does not (as petitioner claims) "effectively declar[e] that Iran loses so long as only Iran loses." Pet. Br. 46. The required findings that Iran has an interest in the assets and others do not are *necessary*, not *sufficient*, conditions for execution.

Petitioner also asserts (at 47) that the necessary findings were "foregone conclusions" because they were not "genuine[ly] dispute[d]." That is incorrect and irrelevant. Clearstream, for example, strenuously (albeit unsuccessfully) argued that turnover of the

assets would constitute an unconstitutional taking of its property. Pet. App. 109a, 111a-12a, 116a-19a; *see also* Clearstream S.J. Opp. 11-19 (sealed). Petitioner's assertion that Section 8772(a)(2) excluded Clearstream's interests misreads the statute: While "custodial interest[s] of a foreign securities intermediary" are excluded from interests that limit execution under Section 8772(a)(2)(*A*), they are *not* excluded from Section 8772(a)(2)(*B*), which pertains to "constitutionally protected interest[s]"—exactly what Clearstream asserted. 22 U.S.C. § 8772(a)(2)(A)-(B). In any event, whether petitioner and others chose to dispute certain factual issues is immaterial. *See Pope*, 323 U.S. at 11. Petitioner's theory would irrationally enable litigants to nullify federal statutes simply by declining to dispute a particular issue.

Even beyond these predicate findings, Section 8772 permits execution against the Iranian Assets only "so long as such assets remain restrained by court order." 22 U.S.C. § 8772(b). New York law accords courts broad discretion to modify existing restraints, including "to prevent 'unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.'" *Guardian Loan Co.* v. *Early*, 392 N.E.2d 1240, 1242-43 (N.Y. 1979) (citation omitted); N.Y. C.P.L.R. § 5240. Far from dictating the outcome, Congress thus expressly preserved the possibility that the court applying the statute might dissolve the restraint rather than permit execution. That Bank Markazi did not seek such relief hardly means that a result in Bank Markazi's favor was unavailable as a matter of law.

II. SECTION 201 OF THE TRIA INDEPENDENTLY AUTHORIZES EXECUTION AGAINST THE IRANIAN ASSETS.

Rather than "'pass upon [the] constitutional question'" petitioner raises regarding Section 8772, the Court can, and therefore should, affirm the court of appeals' judgment on the ground that, as the district court held, TRIA Section 201(a) independently authorizes execution here. *Pearson* v. *Callahan*, 555 U.S. 223, 241 (2009) (quoting *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)); *see also, e.g.*, *Yeager* v. *United States*, 557 U.S. 110, 126 (2009) (respondents may "defend [their] judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals" (internal quotation marks omitted)). Petitioner does not and cannot plausibly contend that TRIA Section 201(a) violates the separation of powers. And the district court's conclusion that Section 201(a) permits execution here is manifestly correct. Pet. App. 96a-98a, 111a-13a.

TRIA Section 201(a) permits execution against "the blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)." TRIA § 201(a). The Iranian Assets are "blocked assets" under Executive Order 13,599. *See* 77 Fed. Reg. at 6659. As the district court held, the Iranian Assets are therefore subject to execution independently of Section 8772. Pet. App. 96a-98a, 111a-13a.

Petitioner resisted this straightforward conclusion below, but its arguments are insubstantial. It contended that the words "blocked *assets of* ... [the] agency or instrumentality of [a] terrorist party" in

Section 201(a) permit execution only against assets "*owned by* [the] terrorist party,'" and that it does not "own" the Iranian Assets. Pet. C.A. Br. 15-19. But its own prior submissions in this case flatly contradict that denial of ownership.

As the district court chronicled, petitioner has repeatedly admitted in this litigation that "it owns the [Iranian Assets] and all proceeds associated with them." Pet. App. 60a; *id.* at 113a (finding that "Bank Markazi has repeatedly insisted that it is the sole beneficial owner of the [Iranian] Assets" and collecting statements). In the district court, petitioner described the Iranian Assets as "'securities *belonging to Bank Markazi*,'" and asserted "that the 'Restrained Securities [*i.e.*, the Iranian Assets] are the *property of Bank Markazi*, the Central Bank of Iran.'" *Id.* at 113a (citation omitted). And two of petitioners' officers "have sworn under penalty of perjury that the [Iranian] Assets are the 'sole property of Bank Markazi and held for its own account.'" *Ibid.* (citation omitted). Assuming arguendo that Section 201(a) requires ownership, petitioner's repeated concessions put any doubt of its ownership to rest. Indeed, if the assets did not belong to petitioner, it is unclear what standing or basis petitioner would have to oppose execution.

Petitioner attempted in the court of appeals to escape its admissions, claiming that its concessions could not control the "'legal question'" of whether it owned the Iranian Assets. Pet. C.A. Br. 21 (citation omitted). And petitioner contends that, under the applicable law, although it is the "beneficial" owner of the Iranian Assets, its beneficial interest does not constitute ownership under the TRIA. *Id.* at 28-34; Pet. Cert. Reply 10. Petitioner is incorrect on both

counts. A party's concessions below are binding on appeal, even on legal issues or mixed questions of law and fact. *See, e.g.*, *Alice Corp.* v. *CLS Bank Int'l*, 134 S. Ct. 2347, 2360 (2014) (validity of patent claim); *N. Ins. Co. of N.Y.* v. *Chatham Cnty., Ga.*, 547 U.S. 189, 194 (2006) (Eleventh Amendment immunity); *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 426, 428 (2006) (whether application of federal law "would substantially burden a sincere exercise of religion").

In any event, petitioner's new position is meritless. Petitioner's argument that its beneficial ownership is insufficient to establish ownership is premised on Article 8 of the U.C.C., which petitioner argued would apply but for Section 8772. Pet. C.A. Br. 24. Article 8 itself makes clear, however, that securities entitlements held by an intermediary *belong to the entitlement holder*, not to the intermediary. Section 8-503(a) provides that "all interests in that financial asset held by the securities intermediary are held by the securities intermediary *for the entitlement holders*, [and] *are not property of the securities intermediary*." U.C.C. § 8-503(a) (emphases added). Instead, "[a]n entitlement holder's property interest with respect to a particular financial asset under [Section 8-503(a)] is a pro rata property interest in all interests in that financial asset held by the securities intermediary." *Id.* § 8-503(b).

"Section 8-503" thus "expresses, in a fashion that takes account of the realities of the modern indirect holding system, the point that is captured by the colloquial notion that when a customer leaves securities with a broker or other intermediary, the securities belong to the customer not the broker." 7A Hawkland U.C.C. Series § 8-503:01 [Rev]. "[I]t is" thus

"correct to say that the *customer*, rather than the intermediary through whom the customer holds the position, *is the 'owner'* of the 'security.'" *Ibid.* (emphases added); *see also* U.C.C. art. 8 prefatory note II.C (1994). Petitioner, which has a *100-percent* beneficial interest in the Iranian Assets, is the "owner" of those Assets under Article 8. Pet. App. 113a.

Moreover, petitioner's beneficial interest in the Iranian Assets is *itself* an attachable "asset." Many courts have held that the term "assets," in New York law and in the TRIA, includes beneficial interests. *See, e.g., EM Ltd.* v. *Republic of Argentina*, 2009 WL 2568433, at *1 (S.D.N.Y. Aug. 18, 2009), *aff'd*, 389 F App'x 38 (2d Cir. 2010); *Weininger* v. *Castro*, 462 F. Supp. 2d 457, 494, 499 (S.D.N.Y. 2006); *see also Bennett* v. *Islamic Republic of Iran*, 799 F.3d 1281, 1290 (9th Cir. 2015) (same).

Petitioner's remaining arguments below rest on inapposite statutory provisions. Petitioner cited cases concerning electronic-fund transfers, Pet. C.A. Br. 31-33, but such transfers are governed by a separate Article of New York's U.C.C., Article 4A. *See, e.g., Export-Import Bank of U.S.* v. *Asia Pulp & Paper Co., Ltd.*, 609 F.3d 111, 118 (2d Cir. 2010). Petitioner also contended that a provision of Article 8 relating to execution *under the U.C.C.* and Federal Rule 69, U.C.C. § 8-112, would not permit execution against the Iranian Assets. Pet. C.A. Br. 25-26. That contention confuses the question whether petitioner "owns" the Assets—which, petitioner concedes, suffices to permit execution under TRIA Section 201(a)—with the separate question whether, *but for* the TRIA, the Iranian Assets would be subject to execution under the U.C.C. The latter question is irrelevant because the TRIA explicitly establishes *new*

rules making property "subject to execution" "[n]otwithstanding any other provision of law." TRIA § 201(a). The law that purportedly would apply in the *absence* of Section 201(a) has no bearing. *See, e.g.*, *United States* v. *All Funds on Deposit with R.J. O'Brien & Assocs.*, 783 F.3d 607, 620 (7th Cir. 2015), *petition for cert. filed*, No. 15-460 (U.S. Oct. 9, 2015).

Petitioner's contention below that the Iranian Assets are immune from execution under 28 U.S.C. § 1611(b)—which protects central-bank assets from execution—fails for the same reason. Section 201(a)'s "notwithstanding" clause, enacted after Section 1611(b), trumps "any other provision of law," including Section 1611(b), that otherwise might prevent execution. TRIA § 201(a). "[A] clearer statement" than a "notwithstanding clause" of Congress's intent to supersede such other laws is "difficult to imagine." *Alpine Ridge*, 508 U.S. at 18 (internal quotation marks omitted).

Petitioner's attacks on Section 8772 are meritless, but in any event they do not matter here. Hewing to the "older, wiser judicial counsel 'not to pass on questions of constitutionality ... unless such adjudication is unavoidable,'" *Pearson*, 555 U.S. at 241 (citation omitted), the Court can and should affirm the judgment below without passing on petitioner's attempt to reshape the separation of powers.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted.

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December 16, 2015

APPENDIX

APPENDIX A

Underlying actions against Iran brought by plaintiffs whose claims for execution were consolidated in No. 10 Civ. 4518 (KBF) (S.D.N.Y.) (*see* Pet. App. 16a-19a, 52a-53a n.1):

Acosta, et al. v. *Islamic Republic of Iran, et al.*, No. 06 Civ. 745 (RCL) (D.D.C.)

Arnold, et al. v. *Islamic Republic of Iran, et al.*, No. 06 Civ. 516 (RCL) (D.D.C.)

Beer, et al. v. *Islamic Republic of Iran, et al.*, Nos. 06 Civ. 473 (RCL) and 08 Civ. 1807 (RCL) (D.D.C.)

Bonk, et al. v. *Islamic Republic of Iran, et al.*, No. 08 Civ. 1273 (RCL) (D.D.C.)

Estate of Bland v. *Islamic Republic of Iran, et al.*, No. 05 Civ. 2124 (RCL) (D.D.C.)

Estate of Brown, et al. v. *Islamic Republic of Iran, et al.*, No. 08 Civ. 531 (RCL) (D.D.C.)

Estate of Heiser, et al. v. *Islamic Republic of Iran, et al.*, Nos. 00 Civ. 2329 (RCL) and 01 Civ. 2104 (RCL) (D.D.C.)

Estate of Silvia, et al. v. *Islamic Republic of Iran, et al.*, No. 06 Civ. 750 (RCL) (D.D.C.)

Greenbaum, et al. v. *Islamic Republic of Iran, et al.*, No. 02 Civ. 2148 (RCL) (D.D.C.)

Khaliq, et al. v. *Republic of Sudan, et al.*, No. 10 Civ. 356 (JDB) (D.D.C.)*†

Kirschenbaum, et al. v. *Islamic Republic of Iran, et al.*, Nos. 03 Civ. 1708 (RCL) and 08 Civ. 1814 (RCL) (D.D.C.)

Levin v. *Islamic Republic of Iran, et al.*, No. 05 Civ. 2494 (GK) (D.D.C.)

Murphy, et al. v. *Islamic Republic of Iran, et al.*, No. 06 Civ. 596 (RCL) (D.D.C.).

Mwila, et al. v. *Islamic Republic of Iran, et al.*, No. 08 Civ. 1377 (JDB) (D.D.C.)†

Owens, et al. v. *Republic of Sudan, et al.*, No. 01 Civ. 2244 (JDB) (D.D.C.)†

Peterson, et al. v. *Islamic Republic of Iran, et al.*, Nos. 01 Civ. 2094 (RCL) and 01 Civ. 2684 (RCL) (D.D.C.)

Rubin, et al. v. *Islamic Republic of Iran, et al.*, No. 01 Civ. 1655 (RCL) (D.D.C.)

Valore, et al. v. *Islamic Republic of Iran, et al.*, No. 03 Civ. 1959 (RCL) (D.D.C.)

Wultz, et al. v. *Islamic Republic of Iran, et al.*, No. 08 Civ. 1460 (RCL) (D.D.C.)**

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* Listed as 08 Civ. 1273 (JDB) (D.D.C.) in Pet. App. 17a, 52a-53a n.1.

† Turnover order vacated as to plaintiffs in these actions July 9, 2013. *See* Pet. App. 19a-20a, 28a.

** Granted permission to intervene May 10, 2013. *See* Pet. App. 19a; D.C. Dkt. 398.

APPENDIX B

U.S. Const. art. I, § 8, cl. 3:

Section 8. The Congress shall have Power

* * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * *

U.S. Const. art. I, § 9, cl. 3:

No Bill of Attainder or ex post facto Law shall be passed.

U.S. Const. art. III:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

U.S. Const. art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Act of Aug. 31, 1852, ch. 111, §§ 6-7, 10 Stat. 110, 112:

SEC. 6. *And be it further enacted*, That the bridges across the Ohio River at Wheeling, in the State of Virginia, and at Bridgeport, in the State of Ohio, abutting on Zane's Island, in said river, are hereby declared to be lawful structures, in their present position and elevation, and shall be so held and taken to be, anything in any law or laws of the United States to the contrary notwithstanding.

SEC. 7. *And be it further enacted*, That the said bridges are declared to be and are established post-roads for the passage of the mails of the United States, and that the Wheeling and Belmont Bridge Company are authorized to have and maintain their said bridges at their present site and elevation, and the officers and crews of all vessels and boats navigating said river are required to regulate the use of their said vessels and boats, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation and construction of said bridges.

Act of July 12, 1870, ch. 251, § 1, 16 Stat. 230, 235:

Be it enacted by the Senate and House of Representatives of the United State of America in Congress assembled, That the following sums be, and the same are hereby, appropriated :—

* * *

For payment of judgments which may be rendered by the court in favor of claimants, one hundred

thousand dollars: *Provided*, That no pardon or amnesty granted by the President, whether general or special, by proclamation or otherwise, nor any acceptance of such pardon or amnesty, nor oath taken, or other act performed in pursuance or as a condition thereof, shall be admissible in evidence on the part of any claimant in the Court of Claims as evidence in support of any claim against the United States, or to establish the standing of any claimant in said court, or his right to bring or maintain suit therein; nor shall any such pardon, amnesty, acceptance, oath, or other act as aforesaid, heretofore offered or put in evidence on behalf of any claimant in said court, be used or considered by said court, or by the appellate court on appeal from said court, in deciding upon the claim of said claimant, or any appeal therefrom, as any part of the proof to sustain the claim of the claimant, or to entitle him to maintain his action in said Court of Claims, or on appeal therefrom; but the proof of loyalty required by the Abandoned and Captured Property Act, and by the sections of several acts quoted, shall be made by proof of the matters required, irrespective of the effect of any executive proclamation, pardon, amnesty, or other act of condonation or oblivion. And in all cases where judgment shall have been heretofore rendered in the Court of Claims in favor of any claimant, on any other proof of loyalty than such as is above required and provided, and which is hereby declared to have been and to be the true intent and meaning of said respective acts, the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction: *And provided further*, That whenever any pardon shall have heretofore been granted by the President of the United

States to any person bringing suit in the Court of Claims for the proceeds of abandoned or captured property under the said act, approved 12th March, 1863, and the acts amendatory of the same, and such pardon shall recite in substance that such person took part in the late rebellion against the government of the United States, or was guilty of any act of rebellion against, or disloyalty to, the United States; and such pardon shall have been accepted in writing by the person to whom the same issued without an express disclaimer of; and protestation against, such fact of guilt contained in such acceptance, such pardon and acceptance shall be taken and deemed in such suit in the said Court of Claims, and on appeal therefrom, conclusive evidence that such person did take part in, and give aid and comfort to, the late rebellion, and did not maintain true allegiance or consistently adhere to the United States; and on proof of such pardon and acceptance, which proof may be heard summarily on motion or otherwise, the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant.

* * *

Pub. L. No. 101-121, § 318(b), 103 Stat. 701, 745 (1989):

(b) (1) In accordance with subsection (b)(2) of this section, all timber sales from the thirteen national forests in Oregon and Washington known to contain northern spotted owls prepared or offered pursuant to this section shall minimize

fragmentation of the most ecologically significant old growth forest stands. "Old growth forest stands" are defined as those stands meeting the criteria according to Forest Service Research Publication Numbered PNW-447. In those instances where the Forest Service, after consultation with the advisory boards established pursuant to subsection (c) of this section, determines that the definition in Forest Service Research Publication Numbered PNW-447 is not fully applicable in national forests known to contain northern spotted owls, the Forest Service shall use old-growth definitions contained in its Pacific Northwest Regional Guide.

(2) To the extent that fragmentation of ecologically significant old growth forest stands is necessary to meet the timber sale levels directed by subsection (a)(1) of this section, the Forest Service shall minimize such fragmentation in the ecologically significant old growth forest stands on a national forest-by-national forest basis based on the Forest Service's discretion in determining the ecologically significant stands after considering input from the advisory boards created pursuant to subsection (c) of this section. The habitat of nesting pairs of spotted owls which are not in the Spotted Owl Habitat Areas (SOHAs) described in subsection (b)(3) of this section shall be considered an important factor in the identification of ecologically significant old growth forest stands.

(3) No timber sales offered pursuant to this section from the thirteen national forests in Oregon and Washington known to contain northern

spotted owls may occur within SOHAs identified pursuant to the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide—Spotted Owl and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 as adjusted by this subsection:

(A) For the Olympic Peninsula Province, which includes the Olympic National Forest, SOHA size is to be 3,200 acres;

(B) For the Washington Cascades Province, which includes the Mt. Baker-Snoqualmie, Okanogan, Wenatchee, and Gifford-Pinchot National Forests, SOHA size is to be 2,600 acres;

(C) For the Oregon Cascades Province, which includes the Mt. Hood, Willamette, Rogue River, Deschutes, Winema, and Umpqua National Forests, SOHA size is to be 1,875 acres;

(D) For the Oregon Coast Range Province, which includes the Siuslaw National Forest, SOHA size is to be 2,500 acres; and

(E) For the Klamath Mountain Province, which includes the Siskiyou National Forest, SOHA size is to be 1,250 acres.

(F) All other standards and guidelines contained in the Chief's Record of Decision are adopted.

(4) In planning for the preparation and offer of timber sales authorized in subsection (a)(1) of this section, the Forest Service, to the extent

possible in areas proximate to SOHA sites identified in subsection (b)(3) of this section, should exercise discretion in selecting sites and/or silvicultural prescriptions in order to retain spotted owl habitat characteristics in such areas. The Forest Service should consider the relative location and quality of such areas contiguous to the SOHAs and should give higher priority to preparing and offering sales in areas of lower quality and less important location than to areas of greater quality and more important location relative to the SOHAs.

(5) No timber sales offered pursuant to this section on Bureau of Land Management lands in western Oregon known to contain northern spotted owls shall occur within the 110 areas identified in the December 22, 1987 agreement, except sales identified in said agreement, between the Bureau of Land Management and the Oregon Department of Fish and Wildlife. Not later than thirty days after enactment of this Act, the Bureau of Land Management, after consulting with the Oregon Department of Fish and Wildlife and the United States Fish and Wildlife Service to identify high priority spotted owl area sites, shall select an additional twelve spotted owl habitat areas. No timber sales may be offered in the areas identified pursuant to this subsection during fiscal year 1990.

(6) (A) Without passing on the legal and factual adequacy of the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide—Spotted Owl Guidelines and

the accompanying Record of Decision issued by the Forest Service on December 8, 1988 or the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the spotted owl, the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR. The guidelines adopted by subsections (b)(3) and (bX5) of this section shall not be subject to judicial review by any court of the United States.

(B) The Forest Service is directed to review and revise as appropriate the decision adopted in the December 1988 Record of Decision referenced in subsection (b)(6)(A) of this section and shall consider any new information gathered subsequent to the issuance of the Record of Decision, including the interagency guidelines for conservation of northern spotted owls developed by the In-

teragency Scientific Committee to address conservation of the northern spotted owl. This review, and any resulting changes to the December 1988 decision determined to be necessary by the Forest Service are to be completed and in effect not later than September 30, 1990.

Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201(a)-(b), (d), 116 Stat. 2322, 2337, 2339, codified at 28 U.S.C. § 1610 note:

SEC. 201. SATISFACTION OF JUDGMENTS FROM BLOCKED ASSETS OF TERRORISTS, TERRORIST ORGANIZATIONS, AND STATE SPONSORS OF TERRORISM.

(a) IN GENERAL.—Notwithstanding any other provision of law, and except as provided in subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

(b) PRESIDENTIAL WAIVER.—

(1) IN GENERAL.—Subject to paragraph (2), upon determining on an asset-by-asset basis that a waiver is necessary in the national security in-

terest, the President may waive the requirements of subsection (a) in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(2) EXCEPTION.—A waiver under this subsection shall not apply to—

(A) property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations that has been used by the United States for any nondiplomatic purpose (including use as rental property), or the proceeds of such use; or

(B) the proceeds of any sale or transfer for value to a third party of any asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

* * *

(d) DEFINITIONS.—In this section, the following definitions shall apply:

(1) ACT OF TERRORISM.—The term "act of terrorism" means—

(A) any act or event certified under section 102(1); or

(B) to the extent not covered by subparagraph (A), any terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration

and Nationality Act (8 U.S.C. 1182(a)(3)(B)(iii))).

(2) BLOCKED ASSET.—The term "blocked asset" means—

(A) any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702); and

(B) does not include property that—

(i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of such license has been specifically required by statute other than the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) or the United Nations Participation Act of 1945 (22 U.S.C. 287 et seq.); or

(ii) in the case of property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges and immunities under the law of the United States, is being used exclusively for diplomatic or consular purposes.

(3) CERTAIN PROPERTY.—The term "property subject to the Vienna Convention on Diplomatic

Relations or the Vienna Convention on Consular Relations" and the term "asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations" mean any property or asset, respectively, the attachment in aid of execution or execution of which would result in a violation of an obligation of the United States under the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, as the case may be.

(4) TERRORIST PARTY.—The term "terrorist party" means a terrorist, a terrorist organization (as defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi))), or a foreign state designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371).

Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502, 126 Stat. 1214, 1258, codified at 22 U.S.C. § 8772:

SEC. 502. INTERESTS IN CERTAIN FINANCIAL ASSETS OF IRAN.

(a) INTERESTS IN BLOCKED ASSETS.—

(1) IN GENERAL.—Subject to paragraph (2), notwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law, a financial asset that is—

(A) held in the United States for a foreign securities intermediary doing business in the United States;

(B) a blocked asset (whether or not subsequently unblocked) that is property described in subsection (b); and

(C) equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran or any agency or instrumentality of that Government, that such foreign securities intermediary or a related intermediary holds abroad,

shall be subject to execution or attachment in aid of execution in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, or hostage-taking, or the provision of material support or resources for such an act.

(2) COURT DETERMINATION REQUIRED.—In order to ensure that Iran is held accountable for paying the judgments described in paragraph (1) and in furtherance of the broader goals of this Act to sanction Iran, prior to an award turning over any asset pursuant to execution or attachment in aid of execution with respect to any judgments against Iran described in paragraph (1), the court shall determine whether Iran holds equitable title to, or the beneficial interest in, the assets described in subsection (b) and that no other person possesses a constitutionally protected interest in the assets described in subsection

(b) under the Fifth Amendment to the Constitution of the United States. To the extent the court determines that a person other than Iran holds—

(A) equitable title to, or a beneficial interest in, the assets described in subsection (b) (excluding a custodial interest of a foreign securities intermediary or a related intermediary that holds the assets abroad for the benefit of Iran); or

(B) a constitutionally protected interest in the assets described in subsection (b),

such assets shall be available only for execution or attachment in aid of execution to the extent of Iran's equitable title or beneficial interest therein and to the extent such execution or attachment does not infringe upon such constitutionally protected interest.

(b) FINANCIAL ASSETS DESCRIBED.—The financial assets described in this section are the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG), that were restrained by restraining notices and levies secured by the plaintiffs in those proceedings, as modified by court order dated June 27, 2008, and extended by court orders dated June 23, 2009, May 10, 2010, and June 11, 2010, so long as such assets remain restrained by court order.

(c) RULES OF CONSTRUCTION.—Nothing in this section shall be construed—

(1) to affect the availability, or lack thereof, of a right to satisfy a judgment in any other ac-

tion against a terrorist party in any proceedings other than proceedings referred to in subsection (b); or

(2) to apply to assets other than the assets described in subsection (b), or to preempt State law, including the Uniform Commercial Code, except as expressly provided in subsection (a)(1).

(d) DEFINITIONS.—In this section:

(1) BLOCKED ASSET.—The term "blocked asset"—

(A) means any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under section 202 or 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701 and 1702); and

(B) does not include property that—

(i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of the license has been specifically required by a provision of law other than the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) or the United Nations Participation Act of 1945 (22 U.S.C. 287 et seq.); or

(ii) is property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Rela-

tions, or that enjoys equivalent privileges and immunities under the laws of the United States, and is being used exclusively for diplomatic or consular purposes.

(2) FINANCIAL ASSET; SECURITIES INTERMEDIARY.—The terms "financial asset" and "securities intermediary" have the meanings given those terms in the Uniform Commercial Code, but the former includes cash.

(3) IRAN.—The term "Iran" means the Government of Iran, including the central bank or monetary authority of that Government and any agency or instrumentality of that Government.

(4) PERSON.—

(A) IN GENERAL.—The term "person" means an individual or entity.

(B) ENTITY.—The term "entity" means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization.

(5) TERRORIST PARTY.—The term "terrorist party" has the meaning given that term in section 201(d) of the Terrorism Risk Insurance Act of 2002 (28 U.S.C. 1610 note).

(6) UNITED STATES.—The term "United States" includes all territory and waters, continental, or insular, subject to the jurisdiction of the United States.

(e) TECHNICAL CHANGES TO THE FOREIGN SOVEREIGN IMMUNITIES ACT.—

(1) TITLE 28, UNITED STATES CODE.—Section 1610 of title 28, United States Code, is amended—

(A) in subsection (a)(7), by inserting after "section 1605A" the following: "or section 1605(a)(7) (as such section was in effect on January 27, 2008)"; and

(B) in subsection (b)—

(i) in paragraph (2)—

(I) by striking "(5), 1605(b), or 1605A" and inserting "(5) or 1605(b)"; and

(II) by striking the period at the end and inserting ", or"; and

(ii) by adding after paragraph (2) the following:

"(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based."

(2) TERRORISM RISK INSURANCE ACT OF 2002.—Section 201(a) of the Terrorism Risk Insurance Act of 2002 (28 U.S.C. 1610 note) is amended by striking "section 1605(a)(7)" and inserting "sec-

tion 1605A or 1605(a)(7) (as such section was in effect on January 27, 2008)"

15 U.S.C. § 78aa–1. Special provision relating to statute of limitations on private causes of action

(a) Effect on pending causes of action

The limitation period for any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

(b) Effect on dismissed causes of action

Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991—

(1) which was dismissed as time barred subsequent to June 19, 1991, and

(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

shall be reinstated on motion by the plaintiff not later than 60 days after December 19, 1991.

15 U.S.C. § 7902. Prohibition on bringing of qualified civil liability actions in Federal or State court

(a) In general

A qualified civil liability action may not be brought in any Federal or State court.

(b) Dismissal of pending actions

A qualified civil liability action that is pending on October 26, 2005, shall be immediately dismissed by the court in which the action was brought or is currently pending.

15 U.S.C. § 7903. Definitions

In this chapter:

(1) Engaged in the business

The term "engaged in the business" has the meaning given that term in section 921(a)(21) of title 18, and, as applied to a seller of ammunition, means a person who devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition.

(2) Manufacturer

The term "manufacturer" means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18.

(3) Person

The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4) Qualified product

The term "qualified product" means a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of title 18), including any antique firearm (as defined in section 921(a)(16) of such title), or ammunition (as defined in section 921(a)(17)(A) of such title), or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.

(5) Qualified civil liability action

(A) In general

The term "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include—

(i) an action brought against a transferor convicted under section 924(h) of title 18, or a comparable or identical State felony law, by a party directly harmed by

the conduct of which the transferee is so convicted;

(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including—

(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

(II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition un-

der subsection (g) or (n) of section 922 of title 18;

(iv) an action for breach of contract or warranty in connection with the purchase of the product;

(v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage; or

(vi) an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of title 18 or chapter 53 of title 26.

(B) Negligent entrustment

As used in subparagraph (A)(ii), the term "negligent entrustment" means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

(C) Rule of construction

The exceptions enumerated under clauses (i) through (v) of subparagraph (A) shall be construed so as not to be in conflict, and no provision of this chapter shall be construed to create a public or private cause of action or remedy.

(D) Minor child exception

Nothing in this chapter shall be construed to limit the right of a person under 17 years of age to recover damages authorized under Federal or State law in a civil action that meets 1 of the requirements under clauses (i) through (v) of subparagraph (A).

(6) Seller

The term "seller" means, with respect to a qualified product—

(A) an importer (as defined in section 921(a)(9) of title 18) who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of title 18;

(B) a dealer (as defined in section 921(a)(11) of title 18) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of title 18; or

(C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17)(A) of title 18) in interstate or for-

eign commerce at the wholesale or retail level.

(7) State

The term "State" includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States, and any political subdivision of any such place.

(8) Trade association

The term "trade association" means—

(A) any corporation, unincorporated association, federation, business league, professional or business organization not organized or operated for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(B) that is an organization described in section 501(c)(6) of title 26 and exempt from tax under section 501(a) of such title; and

(C) 2 or more members of which are manufacturers or sellers of a qualified product.

(9) Unlawful misuse

The term "unlawful misuse" means conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product.

25 U.S.C. § 1701. Congressional findings and declaration of policy

Congress finds and declares that—

(a) there are pending before the United States District Court for the District of Rhode Island two consolidated actions that involve Indian claims to certain public and private lands within the town of Charlestown, Rhode Island;

(b) the pendency of these lawsuits has resulted in severe economic hardships for the residents of the town of Charlestown by clouding the titles to much of the land in the town, including lands not involved in the lawsuits;

(c) the Congress shares with the State of Rhode Island and the parties to the lawsuits a desire to remove all clouds on titles resulting from such Indian land claims within the State of Rhode Island; and

(d) the parties to the lawsuits and others interested in the settlement of Indian land claims within the State of Rhode Island have executed a Settlement Agreement which requires implementing legislation by the Congress of the United States and the legislature of the State of Rhode Island.

25 U.S.C. § 1702. Definitions

For the purposes of this subchapter, the term—

(a) "Indian Corporation" means the Rhode Island nonbusiness corporation known as the "Narragansett Tribe of Indians";

(b) "land or natural resources" means any real property or natural resources, or any interest in or right involving any real property or natural resource, including but not limited to, minerals and mineral rights, timber and timber rights, water and water rights, and rights to hunt and fish;

(c) "lawsuits" means the actions entitled "Narragansett Tribe of Indians v. Southern Rhode Island Land Development Co., et al., C.A. No. 75–0006 (D.R.I.)" and "Narragansett Tribe of Indians v. Rhode Island Director of Environmental Management, C.A. No. 75–0005 (D.R.I.)";

(d) "private settlement lands" means approximately nine hundred acres of privately held land outlined in red in the map marked "Exhibit A" attached to the Settlement Agreement that are to be acquired by the Secretary from certain private landowners pursuant to sections 1704 and 1707 of this title;

(e) "public settlement lands" means the lands described in paragraph 2 of the Settlement Agreement that are to be conveyed by the State of Rhode Island to the State Corporation pursuant to legislation as described in section 1706 of this title;

(f) "settlement lands" means those lands defined in subsections (d) and (e) of this section;

(g) "Secretary" means the Secretary of the Interior;

(h) "settlement agreement" means the document entitled "Joint Memorandum of Understanding Concerning Settlement of the Rhode Island Indian Land Claims", executed as of February 28, 1978, by representatives of the State of Rhode Island, of the town of Charlestown, and of the parties to the lawsuits, as filed with the Secretary of the State of Rhode Island;

(i) "State Corporation" means the corporation created or to be created by legislation enacted by the State of Rhode Island as described in section 1706 of this title; and

(j) "transfer" includes but is not limited to any sale, grant, lease, allotment, partition, or conveyance, any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition, or conveyance, or any event or events that resulted in a change of possession or control of land or natural resources.

25 U.S.C. § 1705. Publication of findings

(a) Prerequisites; consequences

If the Secretary finds that the State of Rhode Island has satisfied the conditions set forth in section 1706 of this title, he shall publish such findings in the Federal Register and upon such publication—

(1) any transfer of land or natural resources located anywhere within the United States from, by, or on behalf of the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, and any transfer of land or natural resources located anywhere within the town of Charlestown, Rhode Island, by, from, or on behalf of any Indian, Indian nation, or tribe of Indians, including but not limited to a transfer pursuant to any statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Act of July 22, 1790, ch. 33, sec. 4, 1 Stat. 137, and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve any such transfer effective as of the date of said transfer;

(2) to the extent that any transfer of land or natural resources described in subsection (a) of this section may involve land or natural resources to which the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, had aboriginal title, subsection (a) of this section shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer; and

(3) by virtue of the approval of a transfer of land or natural resources effected by this section, or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer.

(b) Maintenance of action; remedy

Any Indian, Indian nation, or tribe of Indians (other than the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof) whose transfer of land or natural resources was approved or whose aboriginal title or claims were extinguished by subsection (a) of this section may, within a period of one hundred and eighty days after publication of the Secretary's findings pursuant to this section, bring an action against the State Corporation in lieu of an action against any other person against whom a cause may have existed in the absence of this section. In any such action, the remedy shall be limited to a right of possession of the settlement lands.

28 U.S.C. § 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is

owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement

to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) [Repealed]

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party deter-

mined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) [Repealed]

(g) Limitation on discovery.—

(1) IN GENERAL.— (A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) SUNSET.— (A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) EVALUATION OF EVIDENCE.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) BAR ON MOTIONS TO DISMISS.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) CONSTRUCTION.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

28 U.S.C. § 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL.—

(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD.—The court shall hear a claim under this section if—

(A) (i) (I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this sec-

tion by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS)

in the United States District Court for the District of Columbia.

(b) LIMITATIONS.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a) (1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain

jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) SPECIAL MASTERS.—

(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) PROPERTY DISPOSITION.—

(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) DEFINITIONS.—For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the Interna-

tional Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

28 U.S.C. § 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

28 U.S.C. § 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

28 U.S.C. § 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall

send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dis-

patched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

28 U.S.C. § 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A, regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5), 1605(b), or 1605A of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f) (1) (A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2) (A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) WAIVER.—The President may waive any provision of paragraph (1) in the interest of national security.

(g) PROPERTY IN CERTAIN ACTIONS.—

(1) IN GENERAL.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action

taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) THIRD-PARTY JOINT PROPERTY HOLDERS.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

28 U.S.C. § 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its

immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

New York Civil Practice Law & Rules § 5240. Modification or protective order; supervision of enforcement

The court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure. Section 3104 is applicable to procedures under this article.

Uniform Commercial Code § 8-112. Creditor's Legal Process

(a) The interest of a debtor in a certificated security may be reached by a creditor only by actual seizure of the security certificate by the officer making the attachment or levy, except as otherwise provided in subsection (d). However, a certificated security for which the certificate has been surrendered to the issuer may be reached by a creditor by legal process upon the issuer.

(b) The interest of a debtor in an uncertificated security may be reached by a creditor only by legal process upon the issuer at its chief executive office in the United States, except as otherwise provided in subsection (d).

(c) The interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon the securities intermediary with whom the debtor's securities account is maintained, except as otherwise provided in subsection (d).

(d) The interest of a debtor in a certificated security for which the certificate is in the possession of a secured party, or in an uncertificated security registered in the name of a secured party, or a security entitlement maintained in the name of a secured party, may be reached by a creditor by legal process upon the secured party.

(e) A creditor whose debtor is the owner of a certificated security, uncertificated security, or security entitlement is entitled to aid from a court of competent jurisdiction, by injunction or otherwise, in reaching the certificated security, uncertificated security, or security entitlement or in satisfying the

claim by means allowed at law or in equity in regard to property that cannot readily be reached by other legal process.

Uniform Commercial Code § 8-503. Property Interest of Entitlement Holder in Financial Asset Held by Securities Intermediary

(a) To the extent necessary for a securities intermediary to satisfy all security entitlements with respect to a particular financial asset, all interests in that financial asset held by the securities intermediary are held by the securities intermediary for the entitlement holders, are not property of the securities intermediary, and are not subject to claims of creditors of the securities intermediary, except as otherwise provided in Section 8-511.

(b) An entitlement holder's property interest with respect to a particular financial asset under subsection (a) is a pro rata property interest in all interests in that financial asset held by the securities intermediary, without regard to the time the entitlement holder acquired the security entitlement or the time the securities intermediary acquired the interest in that financial asset.

(c) An entitlement holder's property interest with respect to a particular financial asset under subsection (a) may be enforced against the securities intermediary only by exercise of the entitlement holder's rights under Sections 8-505 through 8-508.

(d) An entitlement holder's property interest with respect to a particular financial asset under

subsection (a) may be enforced against a purchaser of the financial asset or interest therein only if:

(1) insolvency proceedings have been initiated by or against the securities intermediary;

(2) the securities intermediary does not have sufficient interests in the financial asset to satisfy the security entitlements of all of its entitlement holders to that financial asset;

(3) the securities intermediary violated its obligations under Section 8-504 by transferring the financial asset or interest therein to the purchaser; and

(4) the purchaser is not protected under subsection (e).

The trustee or other liquidator, acting on behalf of all entitlement holders having security entitlements with respect to a particular financial asset, may recover the financial asset, or interest therein, from the purchaser. If the trustee or other liquidator elects not to pursue that right, an entitlement holder whose security entitlement remains unsatisfied has the right to recover its interest in the financial asset from the purchaser.

(e) An action based on the entitlement holder's property interest with respect to a particular financial asset under subsection (a), whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against any purchaser of a financial asset or interest therein who gives value, obtains control, and does not act in collusion with the securities intermediary in violating the securities intermediary's obligations under Section 8-504.

Federal Rule of Civil Procedure 69. Execution

(a) IN GENERAL.

(1) *Money Judgment; Applicable Procedure.* A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

(2) *Obtaining Discovery.* In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person—including the judgment debtor—as provided in these rules or by the procedure of the state where the court is located.

(b) AGAINST CERTAIN PUBLIC OFFICERS. When a judgment has been entered against a revenue officer in the circumstances stated in 28 U.S.C. § 2006, or against an officer of Congress in the circumstances stated in 2 U.S.C. § 118, the judgment must be satisfied as those statutes provide.

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IN THE
Supreme Court of the United States

BANK MARKAZI,
THE CENTRAL BANK OF IRAN,
Petitioner,

v.

DEBORAH D. PETERSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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TABLE OF CONTENTS

		Page
I.	Section 8772 Violates the Separation of Powers by Purporting To Change the Law for a Single Pending Case	2
	A. Respondents Fail To Identify Any Historical Precedent for § 8772	2
	B. Respondents' Reliance on This Court's Precedents Is Misplaced	7
	C. Respondents' Remaining Arguments Fail	10
II.	Section 8772 Is Unconstitutional Because It Effectively Dictates the Outcome of a Single Pending Case	14
	A. Congress May Not Direct the Outcome of a Specific Case	14
	B. Section 8772 Left No Meaningful Determinations to the Courts	16
III.	Bank Markazi's Sovereign Status Does Not Alter the Separation-of-Powers Analysis	17
	A. Section 8772 Is Not Public Rights Legislation	17
	B. The Political Branches' Foreign Affairs Powers Do Not Justify § 8772's Intrusion into Judicial Authority	18
IV.	This Court Should Not Address TRIA	20
Conclusion		22

TABLE OF AUTHORITIES

Page(s)

CASES

Baggs's Appeal, 43 Pa. 512 (1862) 3

Calder v. *Bull*, 3 U.S. (3 Dall.) 386 (1798)..... 3

Dames & Moore v. *Regan*, 453 U.S. 654 (1981)..... 19

Evans v. *Jordan*, 13 U.S. (9 Cranch) 199 (1815)..... 4

Free Enter. Fund v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) 11

Heiser v. *Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013) 20, 22

Lebron v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995)..... 14

Lewis v. *Webb*, 3 Me. (3 Greenl.) 326 (1825)..... 3

Me. Cent. R.R. Co. v. *Bhd. of Maint. of Way Emps.*, 835 F.2d 368 (1st Cir. 1987), cert. denied, 486 U.S. 1042 (1988)..... 6

MCM Portfolio LLC v. *Hewlett-Packard Co.*, No. 2015-1091, 2015 WL 7755665 (Fed. Cir. Dec. 2, 2015)..... 5

Medellín v. *Texas*, 552 U.S. 491 (2008)..... 19

Nautilus, Inc. v. *Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014)..... 20

N.Y. State Nat'l Org. for Women v. *Terry*, 159 F.3d 86 (2d Cir. 1998), cert. denied, 527 U.S. 1003 (1999)..... 21

Paramino Lumber Co. v. *Marshall*, 309 U.S. 370 (1940)..... 6, 11

TABLE OF AUTHORITIES—Continued

Page(s)

Pennsylvania v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856) 4, 5, 7, 8

Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) ..... *passim*

Pope v. *United States*, 323 U.S. 1 (1944) 8

Precision Instrument Mfg. Co. v. *Auto. Maint. Mach. Co.*, 324 U.S. 806 (1945) 5

Robertson v. *Seattle Audubon Soc'y*, 503 U.S. 429 (1992) 8, 9, 14, 15

Stern v. *Marshall*, 131 S. Ct. 2594 (2011) 5, 17, 18

United States v. *Brown*, 381 U.S. 437 (1965) 10

United States v. *Klein*, 80 U.S. (13 Wall.) 128 (1872) 9, 14, 15, 16

United States v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) 11

United States v. *Sioux Nation of Indians*, 448 U.S. 371 (1980) 8

Wellness Int'l Network, Ltd. v. *Sharif*, 135 S. Ct. 1932 (2015) 5

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. art. I 1

U.S. Const. art. I, § 6 11

U.S. Const. art. I, § 9 ..... 10, 11

U.S. Const. art. III ..... *passim*

U.S. Const. art. VI 11

U.S. Const. amend. I 11

TABLE OF AUTHORITIES—Continued

Page(s)

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50 U.S.C. §§ 1701 *et seq.* 19
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22 U.S.C. § 8772 ..... *passim*
22 U.S.C. § 8772(a)(2) 16
22 U.S.C. § 8772(a)(2)(A) 16
22 U.S.C. § 8772(a)(2)(B) 16
22 U.S.C. § 8772(b) 13
22 U.S.C. § 8772(c)(1) 6

Consolidated Appropriations Act, 2016, H.R. 2029, div. O (enacted Dec. 18, 2015):
§ 404(e)(2)(B)(iii) 18
§ 404(e)(5) 18
§ 404(f)(1) 18

25 U.S.C. § 1701(d) 6

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TABLE OF AUTHORITIES—Continued

Page(s)

25 U.S.C. §1771(4) 6
6 Stat. 1-942 (1789-1845) 5
Act of Jan. 21, 1808, ch. 13, 6 Stat. 70 4
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Act of Feb. 7, 1815, ch. 36, 6 Stat. 147 4
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§6, 10 Stat. at 112 7
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U.C.C. §8-112(c) 21
U.C.C. §8-112 cmt. 3 21
U.C.C. §8-503 21
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Sup. Ct. R. 15.2 ..... 12, 15

LEGISLATIVE MATERIALS

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U.S. Br. in *Calderon-Cardona* v. *Bank of N.Y. Mellon*, No. 12-75, ECF No. 210 (2d Cir. filed Sept. 21, 2012) 21

IN THE

Supreme Court of the United States

NO. 14-770

BANK MARKAZI,
THE CENTRAL BANK OF IRAN,
Petitioner,

v.

DEBORAH D. PETERSON, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

REPLY BRIEF FOR PETITIONER

Section 8772 creates a new rule explicitly limited to a single pending case. It disclaims *any* effect beyond ensuring that one party to that controversy pays its adversaries nearly $2 billion. Respondents cannot identify a *single example* of Congress passing such legislation in the history of the Republic. And with reason: Article I empowers Congress to enact laws. A statute that purports to dictate how the judiciary must resolve a solitary pending case, with no effect beyond requiring one party to pay its adversaries, is not a "law" as that term is traditionally understood.

Section 8772 is an impermissible attempt by Congress to decide a pending case, a power Article III reserves to

the judiciary. The Framers never would have countenanced such an act. For centuries, no Congress did either. Section 8772 is anathema to judicial independence and the rule of law. It cannot be sustained.

I. SECTION 8772 VIOLATES THE SEPARATION OF POWERS BY PURPORTING TO CHANGE THE LAW FOR A SINGLE PENDING CASE

A. Respondents Fail To Identify Any Historical Precedent for §8772

Section 8772 directs the judiciary to resolve a specific proceeding, identified by caption and docket number, according to a completely new rule. It denies that rule *any* effect beyond that one proceeding. Section 8772 thus has no impact on any other parties or cases and no effect after this proceeding's end.

1. Respondents cannot find a single historical antecedent for §8772. None exists—because Congress has never previously tried to enact a statute that so blatantly invades the judicial power. Congress's "prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995). That historical silence is virtually dispositive.

There is a reason respondents can find no precedent for §8772. One of the foundational distinctions between the legislative and judicial powers was that legislatures enact general laws, while courts decide specific cases. Authorities familiar to the Framers—from Locke to *The Federalist*—made that distinction clear. Pet. Br. 22-25.

Respondents ignore those authorities. They offer no framing-era source articulating a contrary conception of the legislative and judicial powers, much less one suggesting that Congress can change the law for a single

pending case to make one party pay the others. Nor do they dispute that legislative interference with specific pending cases was a principal abuse at which the separation of powers was aimed. Pet. Br. 29-30.

Respondents likewise have no answer to the early state cases rejecting their view. Unlike Congress, early state legislatures sometimes attempted intrusions on judicial authority comparable to §8772. But state courts struck down those laws as inconsistent with the separation of powers. Pet. Br. 30-32. Respondents identify no framing-era cases adopting the opposite view.

Respondents assert that *some* of the state cases involved statutes that attempted to reopen final judgments. Resp. Br. 38. Even if the statutes were *also* objectionable on that ground, the courts struck them down because they purported to alter the law *solely for a single pending case*. See, *e.g.*, *Lewis* v. *Webb*, 3 Me. (3 Greenl.) 326, 336 (1825) (invalidating law that extended time to appeal because "it can never be within the bounds of legitimate legislation, to enact a special law * * * in a particular case"); *Baggs's Appeal*, 43 Pa. 512, 516 (1862) (similar). As Justice Iredell observed in *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798), an act granting new privileges of proceeding "with respect to suits *depending or adjudged* * * * is an exercise of judicial, not of legislative, authority." *Id.* at 398 (emphasis added).

Nor can the early state decisions be dismissed because they involved *state* separation-of-powers principles. Resp. Br. 38. This Court often looks to early state cases for guidance. See, *e.g.*, *Plaut*, 514 U.S. at 223-224. With reason: They reflect framing-era understandings of legislative and judicial power. Respondents are correct that "no decision of this Court" has struck down legislation on that ground. Resp. Br. 36. But that is because, for most

of the Nation's history, Congress never enacted such a law—a "reticence" that speaks volumes. *Plaut*, 514 U.S. at 230.

2. Searching for analogous statutes, respondents scour the annals of private laws, and properly so. If early Congresses thought they could enact legislation limited to a solitary pending case, that is surely where the evidence would be found. But respondents come up dry. The only examples they identify are inapposite for the same reasons as *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), and many other authorities they invoke: The statutes were *not limited to a single pending case*, and they concerned *public rights*. See pp. 7-9, *infra*.

The *only* early private laws respondents identify are statutes granting or extending patents and copyrights. Resp. Br. 41 & n.7.[1] But those laws had legal force beyond a single case: They granted patents or copyrights enforceable for a term against the world. The law conferring patent protection to Oliver Evans's flour mill, for example, did not grant a patent solely for one infringement suit; it granted a patent enforceable against *any* infringer in *any* suit. See Act of Jan. 21, 1808, ch. 13, 6 Stat. 70; *Evans* v. *Jordan*, 13 U.S. (9 Cranch) 199 (1815). If Congress had granted a patent valid only for one specified infringement suit, that might start to look more like §8772. But respondents identify no such statute.

The patent and copyright statutes are also inapposite for a second reason: They involved *public rights*. This Court has long recognized that Congress may determine

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[1] See also, *e.g.*, Act of Mar. 3, 1809, ch. 35, 6 Stat. 80; Act of Feb. 7, 1815, ch. 36, 6 Stat. 147; Act of Mar. 3, 1821, ch. 62, 6 Stat. 262; Act of May 24, 1828, ch. 145, 6 Stat. 389.

matters of public rights—typically claims against the government—without regard to Article III. See *Stern* v. *Marshall*, 131 S. Ct. 2594, 2611-2615 (2011). That was one of the reasons the Court sustained the statute in *Wheeling Bridge*: It concerned a "public right secured by acts of congress." 59 U.S. (18 How.) at 431.

Respondents deny that statutes granting patents and copyrights involve public rights. Resp. Br. 41. The law is otherwise. See, *e.g.*, *MCM Portfolio LLC* v. *Hewlett-Packard Co.*, No. 2015-1091, 2015 WL 7755665, at *3-9 (Fed. Cir. Dec. 2, 2015) (holding that "patent rights are public rights"); cf. *Precision Instrument Mfg. Co.* v. *Auto. Maint. Mach. Co.*, 324 U.S. 806, 815-816 (1945); 1 William C. Robinson, *The Law of Patents for Useful Inventions* §46, at 69-70 (1890). Respondents urge that such laws cannot concern public rights because they confer "rights to exclude other private persons." Resp. Br. 41. But so does any law conveying public *land* to a private person—which is paradigmatic public rights legislation. See *Wellness Int'l Network, Ltd.* v. *Sharif*, 135 S. Ct. 1932, 1966 (2015) (Thomas, J., dissenting).

Having reviewed the more than 3100 private laws enacted between 1789 and 1845, we have not found a single example of Congress changing the law solely for one pending case between other parties. See 6 Stat. 1-942 (1789-1845).[2] That should be all but fatal to respondents' position.

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[2] In two instances, Congress consented to reopening judgments *in favor of the government*. See Act of July 2, 1836, ch. 311, 6 Stat. 672; Act of Aug. 26, 1842, ch. 208, 6 Stat. 864. Those laws were clearly public rights legislation. See Pet. Br. 52. They do not imply any broader power to manipulate a single pending case where the government is not a party.

3. Respondents find no refuge in modern statutes either. The law in *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370 (1940) (Resp. Br. 41), for example, reinstated *administrative* review of a workers' compensation claim. See Act of Apr. 10, 1936, ch. 198, 49 Stat. 2244. This Court upheld that law because it affected *administrative* rather than judicial proceedings—and thus presented no Article III issue at all. See 309 U.S. at 381 & n.25 (contrasting "statutes affecting judicial judgments rather than administrative orders"). The statute in *Maine Central Railroad Co.* v. *Brotherhood of Maintenance of Way Employees*, 835 F.2d 368 (1st Cir. 1987), cert. denied, 486 U.S. 1042 (1988) (Resp. Br. 43), is even further afield. The court upheld that statute because there *were no pending judicial proceedings*: "We cannot find a legislative encroachment on judicial powers, where the judiciary was powerless to act in the controversy." 835 F.2d at 372.

Respondents also invoke "statutes that settled specific suits * * * against States involving Native American land transfers." Resp. Br. 42. In each case, however, Congress enacted implementing legislation to effectuate *the parties'* settlement agreement. See 25 U.S.C. §1701(d) (reciting that "the parties * * * have executed a Settlement Agreement which requires implementing legislation by the Congress"); *id.* §§1721, 1741(4), 1751(d), 1771(4); H.R. Rep. No. 95-1453, at 5 (1978); H.R. Rep. No. 96-1353, at 11 (1980). There is an obvious difference between a statute that implements a settlement and a statute that changes the law for one case for the sole purpose of making one party lose.

Finally, respondents claim that a handful of modern statutes, although facially general in scope, allegedly targeted one or more pending cases. Resp. Br. 42-43. But §8772 *by its terms* is limited to a single pending case. 22

U.S.C. §8772(c)(1). A statute that *on its face* has no legal effect beyond a single proceeding raises far different separation-of-powers concerns than generally applicable legislation allegedly motivated by pending litigation.

Respondents' search for modern antecedents would shed no significant light on Article III's meaning even if it had been successful. For most of the country's history, Congress never attempted anything remotely like §8772. But the absence of even modern antecedents underscores how far Congress strayed from constitutional norms.

B. Respondents' Reliance on This Court's Precedents Is Misplaced

Bereft of historical support, respondents invoke this Court's cases. Those decisions do not endorse what Congress attempted here.

1. Respondents describe *Wheeling Bridge* as upholding "a statute enacted specifically to resolve a dispute in a single case concerning the legality of a particular bridge." Resp. Br. 20. But that statute was *not* limited to a single case. It declared broadly that the bridge was a "lawful structure[] in [its] present position and elevation" notwithstanding *any* law to the contrary. Act of Aug. 31, 1852, ch. 111, §6, 10 Stat. 110, 112. Congress thus changed the bridge's status for *all* purposes, *all* times, and *all* cases. *Any* action, by *any* party, at *any* point, challenging the bridge on *any* basis was subject to that generally applicable law—even a suit unrelated to the navigation concerns in *Wheeling Bridge*. The statute, moreover, designated the bridge a federal post-road. *Id.* §7, 10 Stat. at 112. That change brought still other generally applicable laws to bear. See, *e.g.*, Act of Mar. 3, 1825, ch. 64, §19, 4 Stat. 102, 107 (prohibiting competing delivery services on post roads). Section 8772—which

specifically limits itself to a single pending controversy—is the polar opposite.

Moreover, as Bank Markazi explained (and respondents never contest), *Wheeling Bridge* relied on the *public rights* nature of the law. Pet. Br. 36-37. "[I]nterference with the free navigation of the river," the Court held, "constituted an obstruction of a public right secured by acts of congress." 59 U.S. (18 How.) at 431. The Court also relied on the *prospective* nature of the relief the statute affected: The earlier decree directing removal of the bridge was "executory, a continuing decree." *Ibid.* The Court contrasted the case with a dispute over money: "If the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress." *Ibid.* Respondents ignore those aspects of the Court's reasoning.[3]

2. Jumping forward a century, respondents invoke *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992). They assert that the statute there "applied only to the specific *forests* disputed in [two pending cases], and only for a specific *year*." Resp. Br. 23. But the statute was not limited to two *cases*. As this Court explained, while the statute "made reference to pending cases iden-

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[3] *Pope* v. *United States*, 323 U.S. 1 (1944), and *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980), are similarly inapposite. In *Pope*, Congress prescribed the amount the *federal government* would pay a claimant after a court denied him compensation. See 323 U.S. at 8-10. And in *Sioux Nation*, Congress waived the government's own *res judicata* defense. 448 U.S. at 402-405. Both cases involved paradigmatic public rights authority: The government was spending its own funds and waiving its own defenses, just like any litigant may do. See *Plaut*, 514 U.S. at 230-232. Those cases do not prove that Congress can change the law in a dispute over private rights between other parties.

tified by name and caption number," the reference "served *only to identify the five 'statutory requirements that are the basis for'* those cases." 503 U.S. at 440 (emphasis added). The statute thus altered the law equally for *any suit* challenging the logging based on those five statutory requirements. Pet. Br. 38-39. Respondents may think that distinction immaterial, but this Court found it significant—and thus specifically called it out. 503 U.S. at 440. *Robertson*, moreover, involved claims against the government concerning its management of its own lands—precisely the sort of public rights matter that need not be assigned to Article III courts. Pet. Br. 39.

Most important, *Robertson* expressly declined to reach the question here: whether a statute violates the separation of powers if it "swe[eps] no more broadly, or little more broadly, than the range of applications at issue in [a] pending case[ ]." 503 U.S. at 441. The parties in *Robertson* did not make that argument, so the Court declined to address it. *Ibid.* *Robertson* cannot be precedent for a proposition the Court refused to decide.

3. Respondents claim that *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), "rejected a claim that a statute violated the separation of powers because it directed the result in particular cases." Resp. Br. 23. Not so. *Plaut* involved *generally applicable* legislation. The passage respondents cite consists of three sentences of dicta explaining why *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872)—another case involving *generally applicable* legislation—raised different separation-of-powers concerns. 514 U.S. at 218. That passage does not suggest that Congress can change the law for a single pending case.

Respondents assert that *Plaut* "rejected the view that a statute's breadth bears on whether it infringes the judi-

cial power." Resp. Br. 37. That is incorrect. The "view" *Plaut* rejected was that a statute's breadth could save it if the statute improperly sought to *reopen final judgments*. 514 U.S. at 239. Respondents reason that, "[i]f [a] statute's breadth cannot save it from intruding on the Judiciary's role, neither can the narrowness of a law that does not otherwise infringe the judicial power invalidate it." Resp. Br. 37. That argument defies logic. That a statute's breadth does not save it from *one* separation-of-powers violation (reopening final judgments) does not prove that a statute's scope cannot be relevant to a *different* separation-of-powers violation (invading the judiciary's role of deciding specific cases).

C. Respondents' Remaining Arguments Fail

1. Respondents urge that, because the Bill of Attainder Clause prohibits targeted legislation only when it is punitive, a statute's specificity cannot be relevant to general separation-of-powers principles. The separation of powers, they assert, cannot "invalidate statutes for the *same reasons* as specific, enumerated provisions yet according to *different standards*." Resp. Br. 40.

That is faulty logic. The Bill of Attainder Clause does not invalidate statutes for the "same reasons" as the separation of powers. That Clause prohibits Congress from enacting specific, punitive legislation *whether or not* there is a pending judicial proceeding—indeed, typically absent such a proceeding. See, *e.g.*, *United States* v. *Brown*, 381 U.S. 437 (1965) (invalidating statute prohibiting Communist Party members from serving as union officers or employees). The separation of powers, by contrast, prohibits Congress from picking winners and losers in a *single pending judicial proceeding*. It is that distinct ingredient of a pending case—and the threat to *ju-*

dicial independence such legislation entails—that triggers Article III's application.

To be sure, there is some overlap: A criminal trial before Congress would violate *both* the Bill of Attainder Clause *and* the separation of powers. But that is no reason to truncate Article III. The Constitution sometimes targets specific abuses despite an overlap with broader protections. Compare, *e.g.*, U.S. Const. art. I, § 6 (Speech and Debate Clause), with *id.* amend. I (Free Speech Clause); and *id.* art. VI (Religious Test Clause), with *id.* amend. I (Free Exercise Clause). The Framers singled out bills of attainder because legislative criminal trials were a particularly notorious and egregious abuse. See Pet. Br. 29, 41-42 (collecting sources); Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 260 (1868) (bills of attainder "specially obnoxious"). It is inconsistent with the Framers' design to rely on that prohibition to *relax* separation-of-powers limitations that would otherwise apply.

2. Respondents assert that, because Congress can apply general legislation to pending cases, see *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801); and Congress can enact special legislation independent of a pending case, see *Paramino*, 309 U.S. at 380; Congress can do both at once and change the law for one pending case. Resp. Br. 44-45. That homespun logic likewise fails.

No principle of law or logic says that, if Congress can do one of two things in isolation, it can do both in combination. Examples disproving that specious reasoning are easy to find. See, *e.g.*, *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492-498 (2010) (holding that, although Congress can grant for-cause re-

moval protection to inferior officers, and grant for-cause removal protection to the principal officers who supervise inferior officers, it cannot do both at once). Enacting *specific legislation* to change the law solely for a *pending case* offends the separation of powers in a way that those two acts in isolation do not.

Respondents complain that it is "utterly illogical" that Congress's power should "evaporate[] the moment a complaint is filed in federal court." Resp. Br. 44. But the separation of powers secures *judicial* independence, and the threat to that independence arises only once there is a pending case. It is thus neither "illogical" nor even surprising that Congress's authority should depend in part on the existence of a pending case.

While respondents predict a "raft of uncertainties and practical problems," Resp. Br. 45-46, their fears are contrived. Congress managed to avoid enacting legislation like §8772 for most of the Nation's history. So have the many States whose courts adopted this rule nearly two centuries ago. In any event, purported ambiguities around the edges of a rule are no reason to uphold legislation that blatantly violates any plausible account of the separation of powers.

3. Respondents finally urge that, even if the separation of powers prohibits Congress from enacting a law limited to a single case, that prohibition would not apply here because this action involves an agglomeration of lawsuits. Resp. Br. 46-47. That argument is forfeited because it was not raised in the brief in opposition. See Br. in Opp. 19-26; this Court's Rule 15.2. It is also meritless.

The underlying judgments that established liability were entered in 18 different actions (and a 19th added at the last moment). Pet. App. 16a-17a, 18a-19a. But the

"case" to which §8772 applies is *this enforcement proceeding*—the "proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." 22 U.S.C. §8772(b). *This* case began when the Peterson plaintiffs filed a turnover complaint against Citibank, and Citibank responded by interpleading the other judgment creditors as defendants in this one case. Pet. App. 14a-15a; C.A. App. 1349, 1355. The assets were disposed of in a single opinion, by a single judge, who entered a "judgment" of enforcement (singular) in favor of respondents. Pet. App. 13a, 22a, 52a. *This* proceeding involves only a single pending case.

Even if it did not, the same principles would apply. Section 8772 purports to change the law solely for specified judicial proceedings against a single defendant with no other prospective effect; it surgically decides a pending dispute over the payment of money and nothing more. That interference with the judicial function violates the separation of powers whether Congress changes the law for one case between two parties, one case involving 18 plaintiff groups, or 18 enumerated cases each with one plaintiff group. The "law" must have some existence independent of congressionally enumerated judicial proceedings. Section 8772 does not.[4]

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[4] Respondents assert that Bank Markazi did not preserve this argument below. Resp. Br. 36. But this Court granted review despite that assertion, Br. in Opp. 22-23, and properly so. Bank Markazi expressly argued in its opening brief below that §8772 violates the separation of powers by singling out this one case for disfavored treatment. "Section 8772," it explained, "requires that 'the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518' 'shall be subject to execution' by Plaintiffs in this action." C.A.

II. SECTION 8772 IS UNCONSTITUTIONAL BECAUSE IT EFFECTIVELY DICTATES THE OUTCOME OF A SINGLE PENDING CASE

Section 8772 also intrudes on judicial authority in a second respect: It purports to *dictate the outcome* of a single pending case.

A. Congress May Not Direct the Outcome of a Specific Case

This Court made clear in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), that Congress may not dictate the outcome of pending judicial proceedings. "[T]he legislature," the Court held, may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 146. Such statutes "pass[] the limit which separates the legislative from the judicial power." *Id.* at 147.

The court of appeals assumed that §8772 effectively dictated the outcome of this case, but held that Congress

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Br. 50 (emphasis omitted). "Congress's overt attempt in §8772 to determine the outcome of this case," Bank Markazi urged, "plainly 'usurp[s] the adjudicative function assigned to the federal courts under Article III.'" *Ibid.*; see also *id.* at 49 ("'Congress cannot tell courts how to decide a particular case, but it may make rules that affect classes of cases.'"). Bank Markazi made the same point in reply, specifically quoting *Robertson*'s reference to a law that "'swept no more broadly, or little more broadly, than the range of applications at issue' in a particular case." C.A. Reply 19 n.8. That was more than sufficient to preserve the issue. Besides, "'[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Bank Markazi presented its separation-of-powers *claim* below. Whether Congress violated the separation of powers by dictating the result in a single case, or by changing the law in that case to help its preferred litigant prevail, are at most different *arguments* supporting that claim.

can enact such legislation so long as it purports to amend applicable law. Pet. App. 7a-10a. Respondents barely defend that theory. As Bank Markazi explained, the theory rests on a misreading of *Robertson*, which expressly declined to reach that issue. Pet. Br. 48-49.[5]

Even respondents' amici reject that theory: The statute in *Klein* itself, they observe, unquestionably purported to amend the law. See Constitutional Law & Federal Courts Scholars Br. 20-23 (citing Act of July 12, 1870, ch. 251, 16 Stat. 230, 235). The theory also reduces Article III's protections to an empty formalism, allowing Congress to direct judicial outcomes as it sees fit so long as it declares "we hereby amend the law."

Respondents accordingly take a different tack, asserting that *Klein* prohibits Congress from directing the outcome only for matters on which Congress lacks authority to legislate—such as the effect of a presidential pardon. Resp. Br. 29-30. But that theory is equally wrong. *Klein* made clear that the statute's infringement on the pardon power was an *independent* infirmity: "The rule prescribed is *also* liable to just exception as impairing the effect of a pardon * * * " 80 U.S. (13 Wall.) at 147 (emphasis added). Respondents' view, moreover, would render *Klein* meaningless. A separation-of-powers principle

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[5] Respondents' assertion that Bank Markazi argued the opposite below (Resp. Br. 31) is forfeited and wrong. Respondents never made that argument in their brief in opposition. See Br. in Opp. 22-23; this Court's Rule 15.2. And Bank Markazi stated only that, under existing Second Circuit law, "the key inquiry * * * is whether the statute 'usurp[s] the adjudicative function assigned to the federal courts under Article III' or instead merely 'chang[es] the law applicable to pending cases.'" C.A. Br. 48-49. That statement did not concede that *any* statute that purports to change the law is constitutional under *Klein*.

that condemns statutes only when Congress also violates some *other* constitutional limitation serves no purpose.

This Court need not mark the outer bounds of *Klein* in this case. The separation of powers prohibits Congress from effectively dictating the outcome of a single pending case between other parties. A statute that directs a court how to decide such a case simply is not a "law" as that term is traditionally understood. The Court need hold no more to reverse the judgment below.

B. Section 8772 Left No Meaningful Determinations to the Courts

Despite §8772's avowed purpose of "ensur[ing] that Iran is held accountable for paying the judgments," 22 U.S.C. §8772(a)(2), respondents deny that the statute effectively dictated the outcome here. They point to a number of required "findings" that the assets were blocked, that they were held in the United States for a foreign securities intermediary, and that they were restrained by court order. Resp. Br. 50-52. But respondents do not claim that any of those facts was *disputed*, or even *capable of dispute*. Indeed, on the key issue of whether an entity other than Bank Markazi had a beneficial interest in the assets, the statute *specifically excluded* a "custodial interest of a foreign securities intermediary or a related intermediary that holds the assets abroad for the benefit of Iran"—a provision clearly designed to exclude Clearstream and UBAE, the only other possible stakeholders. 22 U.S.C. §8772(a)(2)(A). Congress does not reserve meaningful authority to the courts by having them decide only collateral, uncontested issues.

The only relevant issue even arguably contested below was whether Clearstream had a *constitutionally protected* interest in the assets, which could bar execution under 22 U.S.C. §8772(a)(2)(B). See Resp. Br. 51-52; Pet. App.

116a-119a; C.A. App. 6011-6014. But that provision was not a genuine reservation of judicial authority either. It was wholly superfluous: A court would have to consider a constitutional claim *even if Congress had not reserved the issue*. If Congress cannot tell a court to award Jones $50,000 in his suit against Smith, Congress also cannot tell the court to award Jones $50,000 "unless constitutionally prohibited." But that is what Congress did here.

III. BANK MARKAZI'S SOVEREIGN STATUS DOES NOT ALTER THE SEPARATION-OF-POWERS ANALYSIS

Respondents and the United States offer various theories why Bank Markazi's sovereign status should change the result. But the court below never considered those arguments—no court has. The Second Circuit's sole rationale was that Congress has free rein to dictate the outcome in a single pending case so long as it amends the law. Pet. App. 7a-10a. This Court need not address Bank Markazi's sovereign status to reject that mistaken view. In any event, these arguments likewise fail.

A. Section 8772 Is Not Public Rights Legislation

Respondents argue that § 8772 is public rights legislation exempt from Article III. Because "[a]cts of state-sponsored terrorism are public acts," they contend, "Congress's decision to make available to victims of such acts new means of satisfying judgments against the foreign state implicates 'public rights' no less than if the United States had elected to pay the judgment itself." Resp. Br. 41-42.

Not so. As this Court explained in *Stern*, the public rights doctrine traditionally applied only to disputes with the *federal government*—the government's plenary power to expend its *own* funds, to manage its *own* property, and to control its *own* amenability to suit includes the

power to dispense with Article III's requirements for claims concerning those functions. 131 S. Ct. at 2611-2615. There is thus a rather obvious difference between Congress "pay[ing] the judgment itself" and Congress forcing *someone else* to pay. Resp. Br. 41-42. That Congress can enact a private law paying Jones $10,000 out of general treasury funds does not prove that Congress can direct a court to order *Smith* to pay that amount.

Indeed, only weeks ago, Congress appropriated over *$1 billion* to compensate terrorism victims, specifically including the plaintiffs here. See Consolidated Appropriations Act, 2016, H.R. 2029, div. O, § 404(e)(2)(B)(iii), (e)(5) (enacted Dec. 18, 2015); see also *id.* § 404(f)(1) (authorizing up to 25% of the funds to be used for attorney's fees). Congress did not have to violate the separation of powers to accomplish that result.

B. The Political Branches' Foreign Affairs Powers Do Not Justify § 8772's Intrusion into Judicial Authority

The United States takes a different approach, asserting vast authority to direct the outcome of specific cases against foreign sovereigns under its foreign relations powers. Those arguments fail.

1. The government first appeals to the Executive Branch's former practice of "determin[ing] the immunity of foreign states * * * on a case-by-case basis." U.S. Br. 21. But as the government admits, § 8772 does more than revoke immunity. It also displaces state property law. *Id.* at 30. And it displaces substantive federal law regarding juridical status. Pet. Br. 27-28. The Executive's former authority to determine *immunity* case by case does not prove that Congress can not only lift immunity but also change *substantive law* so that one party loses on the merits.

2. The government also invokes the claims-settlement authority upheld in *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981). U.S. Br. 23-25. But that authority is the power to "renounce or extinguish claims *of United States nationals* against foreign governments" to effectuate a "treaty" or "executive agreement" between the sovereigns. *Dames & Moore*, 453 U.S. at 679 (emphasis added). This Court has emphasized the "narrow set of circumstances" where that power applies. *Medellín* v. *Texas*, 552 U.S. 491, 531 (2008); see also *Dames & Moore*, 453 U.S. at 660-661. That narrow power is irrelevant where there is no international agreement to effectuate and Congress is simply directing a court to rule against a foreign sovereign despite otherwise applicable law.

3. The government finally invokes the President's blocking authority under statutes like the International Emergency Economic Powers Act, 50 U.S.C. §§1701 *et seq.* U.S. Br. 25-27. That argument is groundless—and only exacerbates separation-of-powers concerns.

The government cites no examples of blocking statutes that authorized confiscation of sovereign assets only in a single pending judicial proceeding. Traditional blocking statutes like the IEEPA are *generally applicable*. See 50 U.S.C. §§1701 *et seq.* Congress's authority to enact such general statutes does not mean Congress can legislate the outcome of a single pending case.[6]

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[6] The government cites the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §2002, 114 Stat. 1464, 1541. U.S. Br. 27. But that statute paid Iranian judgments out of *U.S. government funds*, and Cuban assets were already subject to confiscation. See Pub. L. No. 106-386, §2002(b)(1)-(2), 114 Stat. at 1543; Jennifer K. Elsea, Congressional Research Service, *Suits Against Terrorist States by Victims of Terrorism* 15-18 (Aug. 8, 2008).

The government does not contend that any current blocking statute permits confiscation and redistribution of the assets here. The IEEPA, for example, allows confiscation only "when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals." 50 U.S.C. §1702(a)(1)(C). Section 8772 thus seeks to compel a judicial result that the President could not effect.

Besides, whatever the President's authority, Congress cannot commandeer the judiciary to reach a particular result in one pending case. Even if Congress could authorize the President to confiscate and redistribute these assets, Congress cannot manipulate the law in a single case to require the *courts* to decree that result instead. Dragooning the judicial process in that manner is antithetical to the judicial independence and rule of law that the separation of powers protects.

IV. THIS COURT SHOULD NOT ADDRESS TRIA

Respondents urge the Court not to decide the question presented and to hold that TRIA permits execution instead. Resp. Br. 53-57. The court of appeals, however, declined to reach that issue. See Pet. App. 5a ("We need not resolve this dispute under the TRIA * * * "). This Court is "'a court of review, not of first view.'" *Nautilus, Inc.* v. *Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2131 (2014). Any dispute over TRIA should be left for the court of appeals on remand.

Respondents' argument is also incorrect. TRIA applies only to "blocked assets *of* th[e] terrorist party." 28 U.S.C. §1610 note §201(a) (emphasis added). That language requires *ownership*. See *Heiser* v. *Islamic Repub-*

lic of Iran, 735 F.3d 934, 937-941 (D.C. Cir. 2013).[7] Under U.C.C. Article 8, Bank Markazi does not *own* the assets at issue. Instead, Clearstream's security entitlements at Citibank in New York are *Clearstream's* property. Bank Markazi's only property is its security entitlements against *its* securities intermediary, UBAE, in Europe. See Pet. Br. 4-5; U.C.C. §8-112(c) & cmt. 3.[8]

Respondents' assertion that their construction is "manifestly correct" (Resp. Br. 53) is belied by their own conduct. Respondents would not have gone to the trouble of procuring special legislation directing the outcome of this case if their position were so clear. See Julie Triedman, *Can U.S. Lawyers Make Iran Pay for 1983 Bombing?*, Am. Law., Oct. 28, 2013 (statute designed to "preempt[] Uniform Commercial Code provisions that insulate indirectly held assets from judgment creditors"). Respondents' own amici urge that §8772 was necessary *precisely because* courts construed TRIA narrowly. See Nat'l Security Law Professors Br. 31 (complaining that

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[7] See also U.S. Br. in *Calderon-Cardona* v. *Bank of N.Y. Mellon*, No. 12-75, ECF No. 210, at 16-24 (2d Cir. filed Sept. 21, 2012); U.S. Br. in *Bennett* v. *Islamic Republic of Iran*, No. 13-15442, ECF No. 82, at 14-17 (9th Cir. filed Oct. 23, 2015).

[8] Respondents point to U.C.C. §8-503. Resp. Br. 55-56. But that provision addresses only ownership as between the intermediary and its customer: It means that Clearstream rather than Citibank owns the assets in New York, while Bank Markazi rather than UBAE owns the assets in Italy. See U.C.C. §8-503(a) & cmts. 1-2. Respondents also point to arguments Bank Markazi made early in the proceedings below, outside the context of U.C.C. Article 8. Resp. Br. 54. But a party's *legal arguments* are not binding judicial admissions. See *N.Y. State Nat'l Org. for Women* v. *Terry*, 159 F.3d 86, 97 n.7 (2d Cir. 1998), cert. denied, 527 U.S. 1003 (1999); 30B Michael H. Graham, *Federal Practice and Procedure* §7026, at 325-326 (2011). In any event, the case-specific nature of this dispute underscores why it should be left for remand.

Heiser "places the overwhelming majority of blocked assets beyond the reach of United States victims"). Respondents' TRIA arguments are wrong—and certainly not so clear-cut that this Court should reach out to decide them in the first instance.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

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v.

DEBORAH D. PETERSON, *et al.*,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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TABLE OF CONTENTS

		Page
I.	This Case Presents Important and Unresolved Separation of Powers Questions	2
II.	The Government's Sole Purported Vehicle Problem Is Not a Basis for Denying Review	6
III.	The Decision Below Has Important International Ramifications	8
Conclusion		12

TABLE OF AUTHORITIES

Page(s)

CASES

The Clinton Bridge, 77 U.S. 454 (1870) 5

Dames & Moore v. *Regan*, 453 U.S. 654 (1981) 7

Medellín v. *Texas*, 552 U.S. 491 (2008) 7

Miller v. *French*, 530 U.S. 327 (2000) 5

Pennsylvania v. *Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1856) 4, 5

Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) 5

Robertson v. *Seattle Audubon Soc'y*, 503 U.S. 429 (1992) 3, 4

Roeder v. *Islamic Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003), cert. denied, 542 U.S. 915 (2004) 7

United States v. *Klein*, 80 U.S. 128 (1872) .... *passim*

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. Const. art. III 2

Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502, 126 Stat. 1214, 1258 (codified at 22 U.S.C. § 8772) ..... *passim*

22 U.S.C. § 8772(a)(1) 1

22 U.S.C. § 8772(a)(2) 1, 9

22 U.S.C. § 8772(b) 1

22 U.S.C. § 8772(c)(1) 1

50 U.S.C. § 1702(a)(1)(C) 8

Supreme Court Rule 32.3 10

TABLE OF AUTHORITIES—Continued

Page(s)

TREATY PROVISIONS

Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899 ..... 8, 9
Art. III.1, 8 U.S.T. at 902 9
Art. IV.1, 8 U.S.T. at 903 8
Art. XI, 8 U.S.T. at 908 9
Art. XI.4, 8 U.S.T. at 909 9

EXECUTIVE MATERIALS

Telegram No. 1174 from U.S. Dep't of State to U.S. Embassy in Tehran (Dec. 13, 1954) 10

Telegram No. 1176 from U.S. Embassy in Tehran to U.S. Secretary of State, U.S. Dep't of State Control No. 11,890 (Nov. 27, 1954) 10

OTHER AUTHORITIES

Clearstream Settlement Agreement (Jan. 22, 2014), http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20140123_clearstream_settle.pdf 11

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SUPPLEMENTAL BRIEF FOR PETITIONER

Neither respondents nor the United States denies that Section 8772 singles out this one case—the "proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)"—for radically different treatment while expressly disclaiming any effect on "any [other] proceedings." 22 U.S.C. §8772(b), (c)(1). "In order to ensure that Iran is held accountable for paying the judgments," moreover, the statute directs that nearly $2 billion in assets be paid over to plaintiffs subject only to makeweight findings that Bank Markazi has a beneficial interest in them and that no one else does. *Id.* §8772(a)(1), (2). Congress's attempt to dic-

tate the outcome of this litigation by changing the law solely for purposes of this one case presents an ideal opportunity to reaffirm and clarify the scope of *United States* v. *Klein*, 80 U.S. 128 (1872)—a decision critical to protecting the judicial function of deciding particular cases and controversies from legislative usurpation. None of the government's arguments supports denial of review.

I. This Case Presents Important And Unresolved Separation Of Powers Questions

This case raises important and unanswered questions about *Klein*'s scope: whether Congress can legislatively dictate the outcome of a pending judicial proceeding so long as it reserves nominal or collateral issues for judicial determination; and whether Congress violates the separation of powers by amending the law solely for purposes of one case. The government's efforts to marginalize those important questions are unpersuasive.

A. The government does not dispute that § 8772 left no meaningful questions for judicial determination. Nor does it deny that the Second Circuit upheld the statute despite assuming that it had precisely that effect. Pet. App. 10a. Indeed, the government *endorses* the court of appeals' rationale, urging that "this Court has never suggested that whether there is a 'serious question' about how a statute applies to the facts before a court is the test for determining whether the statute invades the court's Article III functions." U.S. Br. 16.

The breathtaking consequences of the government's theory underscore the need for this Court's intervention. On the government's view, Congress could enact a statute directing a court to award Jones $35,000 for being run over by a postal truck, so long as the court first made a statutorily required finding that the postal truck had

wheels or that the sky is blue. If that is the only constraint *Klein* places on Congress's power to dictate the outcome of a case, the decision is a dead letter—and with it any notion of an independent judiciary.

The government finds no support for its theory in this Court's cases. It insists that *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992), "did not examine whether compliance with the new standards [Congress established] presented a 'serious question.'" U.S. Br. 17. But in fact *Robertson* rejected a *Klein* challenge only because the statute there "expressly reserved judgment upon 'the legal and factual adequacy' of the administrative documents" and "expressly provided for *judicial* determination of the lawfulness of * * * sales." 503 U.S. at 438-439. Nothing in the opinion suggests that the Court viewed those findings as makeweights.

The government's interpretation of *Klein* divests that decision of all force. The Second Circuit's holding adopting that theory warrants this Court's review.

B. The government also does not dispute that this case squarely presents whether Congress can change the law solely for purposes of a single pending case. The government acknowledges that "*Robertson* declined to address the question whether 'even a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue in [a] pending case[].'" U.S. Br. 17 (quoting 503 U.S. at 441). And it cannot deny that §8772 is precisely such a statute. This case thus squarely presents that issue for review.[1]

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[1] Despite acknowledging that *Robertson* reserved decision on this issue, the government elsewhere repeats respondents' error of asserting that *Robertson* actually decided it. *Robertson*, the govern-

The government urges that this Court already decided the issue in *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1856). U.S. Br. 17-18. That is wrong. For one thing, the government cannot explain why the Court would have "declined to address" the issue in *Robertson* if it had already settled the issue in *Wheeling Bridge*—a decision *Robertson* cited multiple times. 503 U.S. at 436, 441. This Court is surely the best judge of whether its own precedents have resolved an issue. That *Robertson* clearly deemed the question open renders the government's reading of *Wheeling Bridge* implausible.

That reading is not just implausible but wrong. In *Wheeling Bridge*, the Court had decreed a bridge an obstruction to navigation, and Congress sought to preserve the bridge by declaring it a federal post-road. 59 U.S. at 429. Critical to the Court's decision upholding that statute was that the case concerned *prospective relief* on a matter of public rights. *Id.* at 431-432. The Court made clear that, "if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress." *Id.* at 431.

The government insists that *Wheeling Bridge* shows that "legislation designed to alter governing law in a single case does not offend separation-of-powers principles."

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ment claims, "explained that *Klein* does not apply when Congress 'amend[s] applicable law' by 'replac[ing] the legal standards underlying' pending litigation, as opposed to directing the disposition of cases under existing law." U.S. Br. 12 (citations omitted). *Robertson* said no such thing. The first quotation comes from a sentence describing the rule applied by the *court of appeals*, which this Court *expressly declined to address*. 503 U.S. at 441. And the second comes from a passage describing only the effect of the statute, not the scope of *Klein*. *Id.* at 437.

U.S. Br. 17. But it ignores this Court's rationale. *Wheeling Bridge* defines the scope of Congress's power to alter a prospective decree—not its power to change the outcome of cases generally. That is how this Court has always understood the decision. See *Miller* v. *French*, 530 U.S. 327, 345-346 (2000) (explaining that *Wheeling Bridge* upheld the statute because "the decree * * * provided for prospective relief" rather than an "award[] [of] money damages in an action at law"); *The Clinton Bridge*, 77 U.S. 454, 463 (1870) ("very different considerations" are presented by an "action * * * at common law for damages"). *Wheeling Bridge* is thus inapposite here. This case involves an effort to force one party to pay other parties large sums of money as compensation for past injuries, not the modification of prospective relief.

Even apart from that distinction, *Wheeling Bridge* does not support what Congress did here. The statute in *Wheeling Bridge* did not change the law solely for purposes of one case. To be sure, the statute targeted *one bridge*. But the change it made—designating the bridge a federal post-road—would have applied equally in *any other litigation concerning that bridge*. *Wheeling Bridge* might resemble this case more closely if Congress had passed a statute deeming the bridge a federal post-road solely for purposes of one pending judicial proceeding. But the Court has never upheld *that* sort of legislation.

That is no small difference. Congress can unquestionably enact legislation directed to a specific problem, party, or property. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995). What Congress may not do is change the law solely for purposes of one *case*. There is no meaningful difference between directing a court to decide a case a particular way and changing the law solely

for purposes of that one case. If Congress does either, it is exercising a judicial rather than legislative function.

II. The Government's Sole Purported Vehicle Problem Is Not A Basis For Denying Review

While respondents tossed out a slew of supposed vehicle defects, the government identifies only one: that "Section 8772 pertains to the rules governing execution against a foreign state's property in satisfaction of a judgment against the foreign state." U.S. Br. 18. That context is no impediment to review.

Nothing in the court of appeals' analysis turned on Bank Markazi's sovereign status. The court ruled against Bank Markazi based on its understanding of *Klein* as a general matter, not any holding that *Klein* applies differently to sovereign entities. Pet. App. 7a-10a. Bank Markazi's status is irrelevant to the court of appeals' rationale and therefore need not be considered by this Court in reviewing it. The importance of the broad legal rule announced below, moreover, in no way depends on the context in which it arose.

In any event, the government fails to show that Bank Markazi's sovereign status has any impact on the *Klein* analysis. The government urges that "*[i]mmunity determinations* were historically made by the Executive on a case-by-case basis." U.S. Br. 18 (emphasis added). That might be a valid argument if § 8772 merely abrogated immunity. But that is not the only thing the statute does. As the government acknowledges, the statute *also* "preempts otherwise applicable state law" by altering substantive property rights under the Uniform Com-

mercial Code. *Id.* at 13-14. There is no similar tradition of case-by-case preemption of state property law.[2]

The government next invokes the claims-settlement authority recognized in cases such as *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981)—namely, the power to "renounce or extinguish claims *of United States nationals* against foreign governments in return for lump-sum payments or the establishment of arbitration procedures." *Id.* at 679 (emphasis added). But directing a court to rule *against* a foreign sovereign notwithstanding otherwise applicable law cannot remotely be characterized as an exercise of that authority. Cf. *Medellín* v. *Texas*, 552 U.S. 491, 531 (2008) (noting that the "claims-settlement cases involve a narrow set of circumstances"). And regardless, the government makes no effort to show that the political branches historically exercised claims-settlement authority by directing the outcome of *particular cases*. The executive order in *Dames & Moore*, for example, "'suspended' *all* 'claims which may be presented to the * * * [Iran-United States Claims] Tribunal.'" 453 U.S. at 666 (emphasis added). It did not direct the outcome of a single pending case.

Finally, the government points to "various blocking statutes that enable the President to block foreign-state assets." U.S. Br. 19. But those too are irrelevant. Block-

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[2] Even with respect to immunity, § 8772's validity is doubtful. The government cites *Roeder* v. *Islamic Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003), cert. denied, 542 U.S. 915 (2004), as an example of a case-specific revocation of immunity. U.S. Br. 18-19. But *Roeder* expressly noted that "it is open to question whether Congress may dictate the outcome of a particular judicial proceeding" and refrained from deciding "whether the amendments, relating as they did specifically to a pending action, violated separation-of-powers principles by impermissibly directing the result of pending litigation." 333 F.3d at 237-238 & n.5.

ing assets is a far cry from expropriating them. See 50 U.S.C. §1702(a)(1)(C) (authorizing confiscation of assets *only* "when the United States is engaged in *armed hostilities* or has been *attacked* by a foreign country or foreign nationals" (emphasis added)). And the government identifies no historical practice of exercising blocking authority by directing the outcome of a particular case. Merely promulgating blocking orders that "could have a dispositive impact on one (or more) pending cases" (U.S. Br. 19) is not the same as dictating the outcome of a single pending case.

The government thus fails to show that this case is unique in any way relevant to the *Klein* analysis. Congress violated the separation of powers by directing the outcome of a single pending case—suspending the Uniform Commercial Code for this case alone so that the court would order one party to pay other parties large sums of money. That is a paradigmatic *Klein* violation, and that is no less true merely because Bank Markazi happens to be a foreign central bank.

III. THE DECISION BELOW HAS IMPORTANT INTERNATIONAL RAMIFICATIONS

The government does not even attempt to defend the Second Circuit's rationale for finding no violation of the Treaty of Amity. And its remaining efforts to downplay this case's international consequences are unpersuasive.

A. The Treaty of Amity expressly prohibits "unreasonable or discriminatory measures that would impair [the] legally acquired rights and interests" of Iranian "nationals and companies." Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, art. IV.1, Aug. 15, 1955, 8 U.S.T. 899, 903. The court below held that §8772 is consistent with the Treaty because it supposedly "contains no country-based discrimination." Pet. App.

7a. The government does not even attempt to defend that rationale. The statute expressly applies only to assets in which "Iran" has a beneficial interest, and its avowed purpose is "to ensure that Iran is held accountable for paying the judgments." 22 U.S.C. § 8772(a)(2).

Instead, the government offers a brand new theory: It contends that state-owned entities like Bank Markazi are not "companies" within the meaning of the Treaty. U.S. Br. 21-23. That never-before-adopted theory defies both the text and the drafting history of the Treaty.

Nothing in the Treaty's text excludes state-owned entities from its protections. Article III.1 defines "companies" broadly as "corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit." 8 U.S.T. at 902. Nothing in that language distinguishes between publicly and privately owned entities. The government seeks support from the reference to "government agencies and instrumentalities" in Article XI. *Id.* at 908-909. But Article XI's use of that more specific term sheds no light on whether "government agencies and instrumentalities" can also be "companies" when established as separate juridical entities. In fact, Article XI.4 specifically refers to "corporations [and] associations" that are "publicly owned or controlled." *Id.* at 909. That provision confirms that "corporations" and "associations"—which Article III.1 defines to be "companies" subject to the Treaty's protections—include publicly owned entities. *Id.* at 902.

Most importantly, the government overlooks unequivocal drafting history. During negotiations, Iranian delegates sought to limit the Treaty to privately owned companies. Observing that the "definition of 'companies' given [in Article III.1] applied to [the] entire treaty and

that other rights and privileges conferred on 'companies' * * * are significant," they "asked that [the] [U.S. State] Department reconsider [the] Iranian request to limit [the] treaty definition to *'privately-owned and managed' companies.*" Telegram No. 1176 from U.S. Embassy in Tehran to U.S. Secretary of State, U.S. Dep't of State Control No. 11,890, at 1 (Nov. 27, 1954) (emphasis added). The United States refused, opining that "[t]o define companies for all treaty purposes as private companies establishes [a] precedent of questionable effect on [the] interests [of] both countries [in] view [of the] trend [in] many countries toward state enterprises." Telegram No. 1174 from U.S. Dep't of State to U.S. Embassy in Tehran 1 (Dec. 13, 1954).[3]

The government's efforts to downplay this case's importance thus contradict its own position during treaty negotiations. Bank Markazi is a distinct legal entity under Iranian law and is treated as a "joint stock compan[y]" for most purposes. C.A. App. 1340. The Treaty thus protects Bank Markazi from discriminatory measures even though the bank is publicly owned. Even if the point were debatable, that would not diminish the case's importance. The International Court of Justice has jurisdiction to resolve such disputes. Pet. 27. The prospect that the decision below may expose the United States to nearly $2 billion in liability before an international tribunal underscores the need for this Court's review.

B. Finally, the government asserts that the decision below does not undermine the United States' reputation as a safe custodian for financial reserves and foreign investment because §8772 is a "narrowly tailored provi-

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[3] These documents are available to be lodged pursuant to this Court's Rule 32.3.

sion" that targeted "assets beneficially owned by the central bank of a state sponsor of terrorism * * * that were being held in the United States in violation of U.S. sanctions laws and regulations." U.S. Br. 23. That argument fails on multiple levels.

First, the alleged "violation[s] of U.S. sanctions laws and regulations" were never adjudicated: Clearstream settled that case without "admi[tting] * * * any allegation" and "solely for the purpose of settling this matter without a final agency finding that a violation has occurred." Settlement Agreement ¶18 (Jan. 22, 2014), http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20140123_clearstream_settle.pdf. Nor does Bank Markazi's status as the Central Bank of Iran diminish the case's importance. Bank Markazi still had a reasonable expectation that plaintiffs' claims would be adjudicated according to the rule of law, including the ordinarily applicable principles of the Uniform Commercial Code, separate juridical status, and central bank immunity. Finally, §8772's "narrowly tailored" nature is precisely what makes the statute objectionable. It sends the message to the world community that Congress will not hesitate to direct courts to rule against disfavored financial institutions if it does not like how the cases would come out under generally applicable law.

The reliability of a legal regime depends on whether it follows the rule of law not merely for politically popular litigants but for unpopular ones as well. (It is no coincidence that *Klein* involved Confederate sympathizers.) If Congress can change the law to dictate the outcome in this case, it can do so in any other case as well, depending on which way the political winds blow. The broad principle announced by the court of appeals opens the door to statutes that decree outcomes in any number of cases.

Notwithstanding the government's assurances, therefore, the decision below sets a bad precedent that substantially impairs the United States' reputation abroad.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In the Supreme Court of the United States

BANK MARKAZI, AKA THE CENTRAL BANK OF IRAN,
PETITIONER

v.

DEBORAH PETERSON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. 8701 *et seq.*, identifies certain "financial assets" in which the Central Bank of Iran has a security entitlement and that were the subject of post-judgment enforcement proceedings in the United States District Court for the Southern District of New York at the time the provision was enacted. 22 U.S.C. 8772(b). The statute makes those assets "subject to execution or attachment in aid of execution in order to satisfy" certain terrorism-related judgments against the Islamic Republic of Iran, provided that the assets are (1) "held in the United States for a foreign securities intermediary doing business in the United States," (2) blocked assets, and (3) "equal in value to a financial asset" held abroad by the securities intermediary on behalf of the Central Bank of Iran. 22 U.S.C. 8772(a)(1). The question presented is:

Whether 22 U.S.C. 8772 violates the separation of powers.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Summary of argument 9
Argument:
I. Congress may validly alter the law governing foreign sovereign assets subject to United States jurisdiction 11
A. Article III permits Congress to change the law applicable to a pending case, so long as it does not dictate the outcome 11
B. Petitioner is incorrect in contending that Congress may not alter the law governing a single case because doing so is equivalent to directing a result in that case 14
C. The political Branches have historically established particularized rules governing claims against foreign sovereigns and foreign sovereign assets, and those actions have long been understood to be consistent with Article III 20
1. This Court has understood the Executive's case-specific foreign sovereign immunity determinations to be consistent with Article III 21
2. The political Branches may settle pending claims against foreign sovereigns or transfer them to a non-Article III tribunal 23
3. The political Branches have long regulated the legal status of specific foreign-state assets, including those involved in pending litigation 25

Table of Contents—Continued: Page

4. Functional considerations inform the political Branches' historical authority concerning claims against, and assets of, foreign sovereigns 27
II. Section 8772 is constitutional because it amends the law applicable to attachment of particular assets of a foreign state and does not direct a result by a court under that law 28
A. Section 8772 validly alters the law applicable to this case in the exercise of Congress's control over foreign-state assets 29
B. Section 8772 does not direct a particular outcome under existing law 32
Conclusion 35

TABLE OF AUTHORITIES

Cases:

Acree v. *Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), cert. denied, 544 U.S. 1010 (2005) 23
American Ins. Ass'n v. *Garamendi*, 539 U.S. 396 (2003) 24
Appeal of Baggs, 43 Pa. 512 (1862) 18
Calder v. *Bull*, 3 U.S. (3 Dall.) 386 (1798) 18
Compania Espagnola de Navegacion Maritima, S.A. v. *The Navemar*, 303 U.S. 68 (1938) 22
Dames & Moore v. *Regan*, 453 U.S. 654 (1981) ..... *passim*
Dandridge v. *Williams*, 397 U.S. 471 (1970) 21
First Nat'l City Bank v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) 4
Fletcher v. *Peck*, 10 U.S. (6 Cranch) 87 (1810) 18
Granfinanciera, S.A. v. *Nordberg*, 492 U.S. 33 (1989) 19
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 20

Cases—Continued: Page

Jones' Heirs v. *Perry*, 18 Tenn. (10 Yer.) 59 (1836) 18
Lewis v. *Webb*, 3 Me. 326 (1825) 18
Marschalk Co. v. *Iran Nat'l Airlines Corp.*, 657 F.2d 3 (2d Cir. 1981) 26
Merrill v. *Sherburne*, 1 N.H. 199 (1818) 18
OBB Personenverkehr AG v. *Sachs*, No. 13-1067 (Dec. 1, 2015) 30
Oetjen v. *Central Leather Co.*, 246 U.S. 297 (1918) 20
Pennsylvania v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856) 9, 13, 14, 16, 19, 33
Peru, Ex parte, 318 U.S. 578 (1943) 21, 22
Petrol Shipping Corp. v. *Kingdom of Greece*, 360 F.2d 103 (2d Cir.), cert. denied, 385 U.S. 931 (1966) 29
Pope v. *United States*, 323 U.S. 1 (1944) 9, 11, 15, 16, 18, 33
Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) 11, 13, 15, 18, 32
Propper v. *Clark*, 337 U.S. 472 (1949) 25, 26, 31, 32
Republic of Austria v. *Altmann*, 541 U.S. 677 (2004) 19, 21
Republic of Iraq v. *Beaty*, 556 U.S. 848 (2009) 23, 27
Republic of Mexico v. *Hoffman*, 324 U.S. 30 (1945) 21, 22
Robertson v. *Seattle Audubon Soc'y*, 503 U.S. 429 (1992) ..... *passim*
Ruggiero v. *Compania Peruana de Vapores "Inca Capac Yupanqui,"* 639 F.2d 872 (2d Cir. 1981) 19
United States v. *Klein*, 80 U.S. (13 Wall.) 128 (1872) ..... *passim*
United States v. *Lee*, 106 U.S. 196 (1882) 22
United States v. *Padelford*, 76 U.S. (9 Wall.) 531 (1870) 12

Cases—Continued: Page

United States v. *Pink*, 315 U.S. 203 (1942) 24
United States v. *Sioux Nation of Indians*, 448 U.S. 371 (1980) 11, 13, 16, 19
United States v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) 9, 11, 24, 33
Verlinden B.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) 21, 22

Constitution, treaties, statutes, and regulations:

U.S. Const.:
Art. I, § 9, Cl. 3 12
Art. III ..... *passim*
Amend. V (Just Compensation and Due Process Clauses) 12
Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899, 1957 WL 52887 30
Act of July 12, 1870, ch. 251, 16 Stat. 235 12
Act of Feb. 27, 1942, ch. 122, 56 Stat. 1122 15
Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1441(d), 1602 *et seq.* 1
28 U.S.C. 1330(a) 19
28 U.S.C. 1604 2
28 U.S.C. 1605-1607 2
28 U.S.C. 1605(a)(7) (2000) 2
28 U.S.C. 1605A 2
28 U.S.C. 1609 2
28 U.S.C. 1609-1611 2
28 U.S.C. 1610 ..... 2, 4
28 U.S.C. 1610(a)(7) 2
28 U.S.C. 1610(b)(3) 2

Statutes and regulations—Continued: Page

28 U.S.C. 1610(g)(1) 4
28 U.S.C. 1610(f)(1)(A) 3
28 U.S.C. 1610 note 3
28 U.S.C. 1611(b)(1) 2, 29
International Emergency Economic Powers Act, Pub. L. No. 95-223, Tit. II, 91 Stat. 1626 (50 U.S.C. 1701 *et seq.*) 3, 25
Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. 8701 *et seq.* 4
22 U.S.C. 8772 (§ 502) ..... *passim*
22 U.S.C. 8772(a) 33
22 U.S.C. 8772(a)(1) 7, 14, 30
22 U.S.C. 8772(a)(2) 7, 32
22 U.S.C. 8772(a)(2)(A) 30, 32
22 U.S.C. 8772(a)(2)(B) 32
22 U.S.C. 8772(a)(1)(C) 29
22 U.S.C. 8772(b) 4, 7
22 U.S.C. 8772(c)(2) 7
National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181:
§ 1083(a), 122 Stat. 338 4
§ 1083(b)(1)(A)(iii), 122 Stat. 341 4
§ 1083(b)(3)(D), 122 Stat. 341 4
Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297:
§ 201, 116 Stat. 2337 3
§ 201(a), 116 Stat. 2337 ..... 4, 7, 31
§ 201(d)(4), 116 Stat. 2340 ..... 4, 31
Trading with the Enemy Act, ch. 106, 40 Stat. 411 (50 U.S.C. App. 1 *et seq.*) 3
50 U.S.C. App. 2(b) (§ 2(b)) 25

Statutes and regulations—Continued: Page

50 U.S.C. App. 5(b) (§ 5(b)) 25
Victims of Trafficking and Violence Protection Act, Pub. L. No. 106-386, Div. C, § 2002, 114 Stat. 1541 27
28 U.S.C. 1963 5
N.Y. U.C.C. Law (McKinney 2002):
§ 8-112 7
§ 8-112(c) 5, 6, 30
31 C.F.R. Pt. 560 6
Exec. Order No. 12,279, 46 Fed. Reg. 7919 (Jan. 19, 1981) 26
Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (Feb. 24, 1981) 25
Exec. Order No. 13,599, 3 C.F.R. 215 (2013) 6

Miscellaneous:

Clearstream Banking, S.A. Settles Potential Liability for Apparent Violations of Iranian Sanctions (Jan. 23, 2014), https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20140123_clearstream.pdf 6
Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* (1868) 18
H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976) 19
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Message to the Congress Reporting the Declaration of a National Emergency With Respect to the Development Fund for Iraq, 39 Weekly Comp. Pres. Doc. 647 (May 22, 2003) 23
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Miscellaneous—Continued. Page

Presidential Determination No. 99-1, Memorandum on Blocked Property of Terrorist-List States, 34 Weekly Comp. Pres. Doc. 2088 (Oct. 21, 1998) 3

In the Supreme Court of the United States

No. 14-770

BANK MARKAZI, AKA THE CENTRAL BANK OF IRAN, PETITIONER

v.

DEBORAH PETERSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case concerns the constitutionality of Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. 8772, which makes certain assets subject to attachment in aid of execution on terrorism-related judgments against Iran. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. a. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, defines the scope of the immunity of a foreign state from suit. The FSIA provides that a "foreign state" and its agencies and instrumentalities are "immune from the jurisdiction" of federal and state courts except as provided by certain international agreements

and by the exceptions to immunity set forth in Sections 1605-1607. 28 U.S.C. 1604; see 28 U.S.C. 1605-1607. One exception to foreign sovereign immunity, known as the "terrorism exception," applies to suits seeking money damages for "personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking," if the foreign state was designated "as a state sponsor of terrorism" by the Secretary of State, either "at the time the act occurred" or later "as a result of such act." 28 U.S.C. 1605(a)(7) (2000); see 28 U.S.C. 1605A (revising and recodifying the terrorism exception).

b. The FSIA also establishes a general rule that "the property in the United States of a foreign state" is "immune from attachment arrest and execution," 28 U.S.C. 1609, with certain exceptions. 28 U.S.C. 1609-1611. As relevant here, Section 1610 makes certain property of foreign states and their agencies and instrumentalities subject to attachment to satisfy terrorism-related judgments. 28 U.S.C. 1610(a)(7) and (b)(3). Under Section 1611(b)(1), however, the property "of a foreign central bank or monetary authority held for its own account" is immune from attachment, including to satisfy terrorism-related judgments, unless the bank "or its parent foreign government" has explicitly waived its immunity. 28 U.S.C. 1611(b)(1).

c. Victims of state-sponsored terrorism who have obtained judgments against a foreign state under the FSIA's terrorism exception have often faced practical and legal difficulties in enforcing their judgments. Congress has enacted a number of statutes designed in part to facilitate enforcement of those judgments.

Enforcement of terrorism-related judgments takes place against the backdrop of the sanctions programs to which the property in the United States of a state sponsor of terrorism typically is subject. See, *e.g.*, International Emergency Economic Powers Act (IEEPA), Pub. L. No. 95-223, Tit. II, 91 Stat. 1626 (50 U.S.C. 1701 *et seq.*); Trading with the Enemy Act (TWEA), ch. 106, 40 Stat. 411 (50 U.S.C. App. 1 *et seq.*). Those programs authorize the President to "block" particular assets subject to the United States' jurisdiction. In general, blocking programs that target governments broadly prohibit transactions concerning property of the targeted foreign government in the absence of Executive Branch authorization.

Congress has enacted several statutes designed to facilitate execution against property that is subject to a blocking regime to satisfy terrorism-related judgments. In 1998, Congress authorized execution against blocked property in which a foreign state has an interest to satisfy any judgment obtained under the terrorism exception "[n]otwithstanding any other provision of law, including" IEEPA, TWEA, and other sanctions programs. 28 U.S.C. 1610(f)(1)(A). Congress authorized the President to "waive" that authorization "in the interest of national security," 28 U.S.C. 1610 note, and the President exercised that authority. Presidential Determination No. 99-1, Memorandum on Blocked Property of Terrorist-List States, 34 Weekly Comp. Pres. Doc. 2088 (Oct. 21, 1998).

Next, in Section 201 of the Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107-297, 116 Stat. 2337, Congress authorized plaintiffs with judgments obtained under the terrorism exception in the FSIA to execute against "the blocked assets of [a] terrorist

party (including the blocked assets of any agency or instrumentality of that terrorist party)." § 201(a) and (d)(4), 116 Stat. 2337, 2340. TRIA thus expanded the universe of property that can be attached to satisfy a terrorism-related judgment by providing that judgment creditors may attach the blocked assets of a juridically separate agency or instrumentality in order to satisfy a judgment against the foreign state itself. See *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-628 (1983) (ordinarily an instrumentality's assets may not be attached to satisfy a claim against the foreign state).

In 2008, Congress amended the FSIA to expand plaintiffs' ability to enforce a terrorism-related judgment against assets of a foreign state. As amended, Section 1610(g)(1) renders the property (whether or not blocked) of a foreign state agency or instrumentality non-immune with respect to execution on a judgment against the foreign state. Any such attachment must, however, occur "as provided in this section"—that is, in accordance with the other requirements of Section 1610. 28 U.S.C. 1610(g)(1); see National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(a), (b)(1)(A)(iii), and (3)(D), 122 Stat. 338-341.

In 2012, while this case was pending, Congress again rendered additional blocked assets subject to attachment by enacting the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. 8701 *et seq.* See 22 U.S.C. 8772; p. 7, *infra*.

2. a. Respondents are more than 1000 victims of terrorist attacks sponsored by Iran, or the representatives and surviving family members of such victims. Pet. App. 52a-53a. They have obtained "billions of

dollars in judgments against Iran" under the FSIA's terrorism exception to foreign state immunity. *Id.* at 53a. Respondents registered their judgments in the United States District Court for the Southern District of New York, where they sought to execute their judgments on any property of Iran they could identify within that jurisdiction. *Id.* at 53a-54a; see 28 U.S.C. 1963.

Respondents proceeded against approximately $1.75 billion in bonds (the bond assets) held in a New York account at Citibank, N.A., on behalf of petitioner. Pet. Br. 9-10; Pet. App. 2a. Petitioner "is the Central Bank of Iran, which is wholly owned by the Iranian government." *Ibid.* Petitioner has a "beneficial interest" in the bond assets, which are held by Citibank, N.A., in an omnibus account for Clearstream Banking, S.A., a financial intermediary in Luxembourg. *Ibid.* Clearstream maintains the Citibank account in part for Banca UBAE S.p.A., an Italian bank, whose customer is, in turn, petitioner. *Ibid.*

In 2008, when some respondents learned of the existence of the bond assets, they obtained from the district court a writ of execution, which restrained the assets. Pet. App. 62a. At the outset of the litigation, the bonds had not yet matured, so the assets took the form of security entitlements. Pet. Br. 9-10 & n.1. Clearstream argued that respondents could not execute against the bond assets under New York state law. See Pet. App. 106a; note 7, *infra*. Under the New York Uniform Commercial Code, "[t]he interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon the securities intermediary with whom the debtor's securities account is maintained." N.Y. U.C.C. Law § 8-112(c)

(McKinney 2002). Because Clearstream did not maintain an account in petitioner's name, the district court agreed with Clearstream that the bond assets could not be attached under Section 8-112(c). Pet. App. 126a.

In 2010, respondents filed amended complaints against petitioner, Clearstream, Citibank, and UBAE, seeking turnover of the assets. Pet. App. 3a; see *id.* at 62a-63a. Citibank filed an interpleader action, and the district court consolidated the various proceedings concerning the bond assets. *Id.* at 15a.

In 2012, while the consolidated proceedings were pending, the President issued Executive Order 13,599, which blocked "[a]ll property and interests in property of the Government of Iran, including the Central Bank of Iran, that are in the United States." Exec. Order No. 13,599, 3 C.F.R. 215 (2013). The President determined that the blocking action was appropriate in light of "the deceptive practices of [petitioner] * * * to conceal transactions of sanctioned parties."[1] *Ibid.* The bond assets were among those blocked by the Executive Order. Once the bond assets were blocked, respondents sought summary judgment on

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[1] Upon learning that Clearstream maintained securities on behalf of petitioner that were custodized and located in the United States, the Treasury Department's Office of Foreign Assets Control initiated an investigation of Clearstream for potentially exporting financial services from the United States to Iran in violation of the Iranian Transactions and Sanctions Regulations (ITSR), 31 C.F.R. Pt. 560. See *Clearstream Banking, S.A. Settles Potential Liability for Apparent Violations of Iranian Sanctions* 1 (Jan. 23, 2014), https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20140123_clearstream.pdf. Clearstream "exported custody and related services from the United States to [petitioner] in apparent violation of the ITSR" and paid approximately $152 million to settle its "potential civil liability." *Ibid.*

their claim for execution under TRIA, which permits execution against "the blocked assets of any agency or instrumentality of th[e] terrorist party" to satisfy a judgment under the FSIA's terrorism exception. § 201(a), 116 Stat. 2337; Pet. App. 3a. Petitioner argued (Br. 11) that the bond assets were not subject to execution under TRIA because they were not petitioner's property under Section 8-112 of the New York U.C.C., and thus were not assets "of" an agency of a terrorist party under TRIA.

While that motion was pending, Congress enacted Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012. 22 U.S.C. 8772; Pet. App. 3a-4a. Section 8772(a)(1) provides that, "notwithstanding any other provision of law, and preempting" state law, a financial asset that is a blocked asset held in the United States for a foreign securities intermediary doing business in the United States, and equal in value to a financial asset of Iran, "shall be subject to execution to the extent of any compensatory damages awarded against Iran for damages for personal injury or death caused by an act of [terrorism]." 22 U.S.C. 8772(a)(1). The statute requires the court, before permitting execution against such assets, to "determine whether Iran holds equitable title to, or the beneficial interest in, the assets," and also "that no other person possesses a constitutionally protected interest in the assets." 22 U.S.C. 8772(a)(2). By its terms, the statute applies only to the bond assets that were subject to restraining orders issued by the district court in this case, so long as they remain restrained. 22 U.S.C. 8772(b) and (c)(2).

b. The district court granted partial summary judgment to respondents, holding that the bond assets

were subject to turnover under Section 8772 and TRIA.[2] Pet. App. 52a-124a. As required by Section 8772, the district court determined that "[o]n this record and as a matter of law," only petitioner had a beneficial interest in the bond assets. *Id.* at 111a-112a.

The district court rejected petitioner's contention that Section 8772 violates the separation-of-powers principles explicated in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), concluding that Congress had not "dictated specific factual findings in connection with a specific litigation." Pet. App. 114a-115a.

3. The court of appeals affirmed. Pet. App. 1a-12a. On appeal, petitioner "concede[d] that the statutory elements for turnover of the assets under [Section] 8772 have been satisfied." *Id.* at 2a.

Petitioner argued, however, that Section 8772 violates the separation of powers. Pet. App. 2a. The court of appeals rejected that argument. *Id.* at 7a-10a. The court acknowledged that, under *Klein*, *supra*, Congress impermissibly usurps the courts' adjudicative role under Article III of the Constitution if it directs the outcome of a case under existing law. Pet. App. 8a. But, the court continued, Congress may constitutionally alter the law governing a pending case, even if doing so changes the outcome of the case. *Id.* at 8a-9a (discussing *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429 (1992)). The court concluded that Section 8772 "retroactively changes the law applicable in this case, a permissible exercise of legislative authority." *Id.* at 8a.

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[2] After the district court entered its order, the Treasury Department issued a license authorizing transfer of the assets to a trust account. Pet. App. 22a-23a.

SUMMARY OF ARGUMENT

I. This Court has long held that Congress has broad authority to alter the law applicable to pending cases. See *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801). In a series of decisions beginning with *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), the Court has made clear that Congress does not invade the courts' adjudicative function under Article III unless it purports to direct a particular result in a pending case under existing law. The Court has also established that a statute does not infringe upon the judicial power simply because it creates standards that make a particular result virtually certain. See *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 437 (1992); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856) (*Wheeling Bridge*).

The critical question under Article III is therefore whether Congress has left any adjudicatory function for the courts to perform, or whether it has instead improperly directed a particular application of existing law. That is equally true when Congress alters the legal standard governing a single pending case. This Court has upheld legislation that altered the law for a single identified case, as well as statutes that had the purpose and effect of altering the law for a single case. See *Pope* v. *United States*, 323 U.S. 1, 10-11 (1944); *Wheeling Bridge*, *supra*.

Even if legislation directed to a single case might in some contexts raise Article III concerns, such concerns are not present in the context of claims against foreign sovereigns and their assets. In furtherance of their exclusive authority over the Nation's foreign relations, the political Branches have long exercised

extensive control over claims against foreign states and the disposition of foreign-state assets subject to United States jurisdiction—including by determining the law governing a single case. The Executive Branch historically made case-specific determinations of foreign sovereign immunity that were binding on the courts, and it has settled or extinguished the claims of U.S. citizens against foreign sovereigns. The political Branches also have long regulated specific foreign-state assets in the United States, including by blocking them, vesting title in the United States, allowing attachment, or ordering transfer to compensate U.S. citizens for claims against foreign states. See generally *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981). Those actions have never been understood to invade the Article III judicial power.

II. Section 8772 is a valid exercise of Congress's authority to regulate the disposition of specific foreign-state assets subject to the jurisdiction of the United States. The statute alters the law applicable to Iran's claim of sovereign immunity, as well as the law governing the circumstances under which particular property in which Iran has an interest may be attached to satisfy judgments against Iran. Section 8772 thus falls well within the political Branches' established authority over foreign sovereign immunity and foreign sovereign assets.

In addition, Section 8772 does not direct a result under existing law. It created a new legal standard governing the attachment of the bond assets, but left to the court the authority to make the predicate determinations on which Section 8772 conditioned any right to attachment.

ARGUMENT

I. CONGRESS MAY VALIDLY ALTER THE LAW GOVERNING FOREIGN SOVEREIGN ASSETS SUBJECT TO UNITED STATES JURISDICTION

A. Article III Permits Congress To Change The Law Applicable To A Pending Case, So Long As It Does Not Dictate The Outcome

1. It is well established that Congress may enact a statute that changes the law applicable to pending cases. As Chief Justice Marshall explained in *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), "if subsequent to the judgment and before the decision of an appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." *Id.* at 110; *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995). This Court has therefore routinely enforced statutes that alter the law governing pending cases. See, *e.g.*, *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 438-439 (1992); *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 391-395 (1980); *Schooner Peggy*, 5 U.S. (1 Cranch) at 110.

Congress's alteration of the governing law, without more, does not invade the courts' judicial function under Article III. While the court "must apply" a retroactive law in a pending case, the court retains authority to construe the statute, to apply it to the facts before it, to make any necessary factual determinations, and to enter judgment for one party or the other. *Plaut*, 514 U.S. at 226; see *id.* at 218 (Congress, consistent with Article III, may "set out" new "substantive legal standards for the Judiciary to apply."); *Robertson*, 503 U.S. at 438; *Pope* v. *United States*, 323 U.S. 1, 10-11 (1944). Other constitutional provisions—

including the prohibitions on singling out persons for punishment, taking property without just compensation, and arbitrarily applying a statute retroactively in a manner that does not comport with due process—instead serve as the primary restrictions on Congress's ability to change the law applicable to pending cases. See U.S. Const. Art. I, § 9, Cl. 3 (prohibiting ex post facto laws and bills of attainder); Amend. V (Just Compensation and Due Process Clauses).

2. While Article III permits Congress to alter the law governing a pending case, this Court held in *United States* v. *Klein* that Congress invades the judicial function when it instead purports to direct a particular result in a pending case under existing law. 80 U.S. (13 Wall.) 128, 146-147 (1872). *Klein* concerned a statute enacted in response to the Court's decision in *United States* v. *Padelford*, 76 U.S. (9 Wall.) 531, 542-543 (1870), which had held that receipt of a Presidential pardon constituted proof of loyalty for purposes of a statute providing for return of property seized by Union military authorities. Congress purported to overturn *Padelford* by enacting a statute directing the courts to treat receipt of a pardon as conclusive evidence of the claimant's disloyalty and to dismiss any pending claim for recovery of property, and any appeal of a judgment in favor of the claimant, based on a pardon. Act of July 12, 1870, ch. 251, 16 Stat. 235; see *Klein*, 80 U.S. (13 Wall.) at 132-134, 143-144. This Court held that "Congress ha[d] inadvertently passed the limit which separates the legislative from the judicial power." *Klein*, 80 U.S. (13 Wall.) at 147. The statute at issue, the Court explained, "prescribe[d] a rule for the decision of a cause in a particular way" and could not be sustained "without allowing one par-

ty to the controversy to decide it in its own favor." *Id.* at 146.

Subsequent decisions have clarified *Klein*'s scope in two respects. First, the Court has explained that *Klein* applies only when Congress enacts a statute that directs a particular result under governing law. In *Robertson*, the Court upheld legislation that was enacted "[i]n response to" litigation challenging certain government timber-harvesting plans under various environmental statutes, and that "replaced" the standards set forth in those statutes. 503 U.S. at 433, 437. In sustaining the legislation, the Court reasoned that Congress permissibly altered the governing standards and did not either direct "findings or results under old law" or "instruct the courts whether any particular timber sales would violate" the new standards. *Id.* at 438-439. Thus, "whatever the precise scope of *Klein* * * * , later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" *Plaut*, 514 U.S. at 218 (quoting *Robertson*, 503 U.S. at 441).

Second, this Court's decisions indicate that *Klein* does not prevent Congress from amending the law in a manner that makes a particular outcome virtually certain, so long as Congress does not "prescribe a rule for decision that [leaves] the court no adjudicatory function to perform." *Sioux Nation*, 448 U.S. at 392. In *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), for instance, the Court upheld a statute that declared a bridge to be a "lawful structure[]" in response to an earlier decision holding that it was a nuisance and issuing an injunction. *Id.* at 429. The new statute established that the bridge was not a nuisance, and the Court accordingly declined to

enforce the existing injunction. Despite that significant impact on the outcome, the *Klein* Court reaffirmed that the *Wheeling Bridge* statute did not direct a result in the case, explaining that "the court was left to apply its ordinary rules to the new circumstances created by the act." 80 U.S. (13 Wall.) at 147. Similarly, in *Robertson*, the statute replaced the governing environmental-law standards with a legislative compromise that permitted harvesting in all but certain designated areas. 503 U.S. at 434-435. Nonetheless, the Court upheld the statute because it did not "instruct the courts" whether any particular actions violated the new standards. *Id.* at 438-439.

B. Petitioner Is Incorrect In Contending That Congress May Not Alter The Law Governing A Single Case Because Doing So Is Equivalent To Directing A Result In That Case

Petitioner's primary contention (Br. 22) is that although Congress may generally alter the law governing pending cases, Congress violates Article III when it changes the law "for a single pending case."[3] Petitioner's "single case" argument here ignores the fact that these proceedings resulted from the consolidation of numerous separate motions to execute upon the bond assets to satisfy numerous separate judgments against Iran. Section 8772 thus is directed to a *category* of claims and not to a single claim, as its text makes clear. See 22 U.S.C. 8772(a)(1) (assets are subject to execution and attachment to satisfy "any

[3] As respondents observe (Br. 13 n.2), petitioner did not timely present its single-case argument to the court of appeals, and that court did not pass on the question.

judgment" against Iran based on specified acts of terrorism).

In any event, petitioner does not explain precisely why it thinks a law directed to a single case is constitutionally suspect. Petitioner does not dispute (Br. 35) that Congress may permissibly alter the law governing multiple pending cases. Petitioner also acknowledges (Br. 41) that Congress may enact legislation that is tailored to a particular situation, or even to a "legitimate class of one." *Plaut*, 514 U.S. at 239 n.9 (noting historical prevalence of private bills and other specific legislation). But in petitioner's view, Congress may not do both at once. Petitioner appears to argue that when Congress provides a new legal standard to govern a particular pending case, it has effectively "dictate[d]" how the court must decide an "individual case[]" before it, thereby violating the rule of *Klein*. Br. 22; see *id.* at 25, 29-32. This Court's decisions refute that contention.

1. a. This Court has upheld legislation that created new standards that were expressly limited to a single pending case, and that had the effect of altering the result in that case.

In *Pope*, *supra*, the Court upheld a statute that directed the Court of Claims, "notwithstanding any prior determination [or] statute of limitations," to "render judgment at contract rates upon the claims of Allen Pope * * * for certain work performed for which he has not been paid," after "determin[ing] the extent of the [government's] obligation by reference" to facts specified in the statute. Act of Feb. 27, 1942, ch. 122, 56 Stat. 1122. The government argued that the statute violated Article III, in part because "[t]he statute is not one of general applicability, which is

given effect in a pending judicial inquiry," but rather "has reference only to the particular claims of Allen Pope." U.S. Br. at 33, *Pope*, *supra* (No. 44-26). This Court rejected that argument, holding that Congress "did not encroach upon the judicial function" by "directing [the] court to pass upon petitioner's claims in conformity to the particular rule of liability prescribed by the Special Act," because the court retained the authority to apply the statute by calculating damages. *Pope*, 323 U.S. at 10; see also *Sioux Nation*, 448 U.S. at 390-407 (upholding statute that removed defense of res judicata for an identified pending case because it did not direct a particular outcome on the merits of the plaintiffs' claims).

b. This Court has also held that Congress may enact statutes that, while not explicitly directed to a particular case, have the purpose and effect of altering the law for a single case.

In *Wheeling Bridge*, the Court upheld a statute enacted in response to an earlier decision holding that the bridge was a nuisance and granting prospective relief. 59 U.S. (18 How.) at 429-430. The statute declared "the bridges across the Ohio River at Wheeling" to be lawful structures, "notwithstanding" any contrary law. *Ibid.* In concluding that the statute permissibly altered the governing law rather than directing a result, the Court did not suggest that the statute's specificity—and its evident purpose of reversing the Court's earlier decision—was relevant to the Article III analysis. *Id.* at 431-432; see *Klein*, 80 U.S. (13 Wall.) at 147. Similarly, in *Robertson*, the legislation at issue was enacted "[i]n response to [the] ongoing litigation," was designed to provide a basis for permitting the timber harvesting that the lower

court had enjoined, applied only to the forests at issue in the suit, and expired automatically at the end of the fiscal year. 503 U.S. at 433. Despite that specificity, the Court held that the statute was valid because it did not direct the court to make particular findings under the new standards.[4] *Id.* at 438-439.

Petitioner argues (Br. 36, 38) that those statutes were unobjectionable because they were not expressly limited to a single case, and therefore they would have applied had any other plaintiffs brought similar cases. But that is not a sensible distinction, because Congress could circumvent Article III limitations simply by omitting an explicit reference to the case it has in mind. And in any event, the statutes at issue in *Robertson* and *Wheeling Bridge* reached—at most—a limited set of cases. If Congress may legislate with the purpose and effect of altering the rules governing a small set of cases, there is no evident reason why it should not be able to do the same with respect to a single case—so long as Congress does not violate *Klein* by prescribing an outcome under existing law.

2. Petitioner's arguments to the contrary are unpersuasive.

a. Lacking support in this Court's decisions concerning particularized statutes, petitioner argues (Br. 23-25, 30-32) that various historical authorities indicate that legislatures may not enact rules for a single pending case. Petitioner does not cite a single deci-

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[4] The Court reserved the question whether the statute was unconstitutional purely because it pertained to a single case. *Robertson*, 503 U.S. at 441. But the Court did hold that the statute (despite its targeted effect) did not dictate a result in that single case. *Id.* at 438-439.

sion, however, that invalidated a statute on the ground that it pertained to a single case.

The bulk of the cases and authorities on which petitioner relies concerned the separate principle that a legislature may not reopen or set aside final judgments. See *Plaut*, 514 U.S. at 219-224 (citing many of the same authorities as examples of the principle that legislatures may not set aside final judgments); see also, *e.g.*, *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 398 (1798) (Iredell, J., concurring); *Lewis* v. *Webb*, 3 Me. 326, 332-333 (1825); *Merrill* v. *Sherburne*, 1 N.H. 199, 199-200 (1818); *Appeal of Baggs*, 43 Pa. 512, 515 (1862). Others concerned state legislatures' adjudication of private rights in particular cases. See, *e.g.*, *Jones' Heirs* v. *Perry*, 18 Tenn. (10 Yer.) 59, 70 (1836); Thomas Jefferson, *Notes on the State of Virginia* 170-171 (2d Am. ed. 1794); Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 91 (1868) (discussing cases in which legislature adjudicated rights); cf. *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) ("application of" existing laws to particular parties is not a legislative function).

b. Petitioner also argues (Br. 35) that the decisions of this Court that are discussed at pages 15-17 above are inapplicable here because they concerned "public rights—claims against the federal government that Congress need not even commit to an Article III forum," as distinguished from contract or tort claims between private parties. *Id.* at 42. The Court has not suggested that its Article III analysis concerning the application of new law in pending cases turned on any characterization of the claims as concerning public rights. See *Pope*, 323 U.S. at 9-11; see also *Robertson*,

503 U.S. at 438-439; *Sioux Nation*, 448 U.S. at 406-407; *Wheeling Bridge*, 59 U.S. (18 How.) at 431-432. But even if Congress's authority to alter the law applicable to a single pending case were limited to contexts historically thought to be amenable to resolution by the political Branches, this case plainly involves such a context. See *Republic of Austria* v. *Altmann*, 541 U.S. 677, 696 (2004) (contrasting suit involving foreign sovereign immunity with one involving "private rights"). Like suits against the United States government, suits against foreign states were "unknown to the common law" because foreign states enjoyed absolute immunity from suit.[5] *Ruggiero* v. *Compania Peruana de Vapores "Inca Capac Yupanqui,"* 639 F.2d 872, 878 (2d Cir. 1981) (Friendly, J.). Also like claims against the United States, claims against foreign sovereigns were historically resolved by the political Branches. Those Branches exercised broad authority over such claims, as well as the proper disposition of foreign-state assets in the United States. See Part. I.C, *infra*.

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[5] Accordingly, suits against foreign states do not require a trial by jury. See 28 U.S.C. 1330(a); H.R. Rep. No. 1487, 94th Cong., 2d Sess. 13 (1976) (analogizing to suits against the United States in explaining why "jury trials are excluded"); *Ruggiero* v. *Compania Peruana de Vapores "Inca Capac Yupanqui,"* 639 F.2d 872, 878 (2d Cir. 1981); cf. *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 39 (1989).

C. The Political Branches Have Historically Established Particularized Rules Governing Claims Against Foreign Sovereigns And Foreign Sovereign Assets, And Those Actions Have Long Been Understood To Be Consistent With Article III

The political Branches historically have exercised extensive authority over claims against foreign sovereigns and the disposition of foreign-state assets subject to the United States' jurisdiction—including by specifying the substantive law to be applied in a particular pending case. Those actions have never been thought to be inconsistent with courts' exercise of the "judicial Power" under Article III. To the contrary, this Court has long recognized that in adjudicating suits against foreign sovereigns, courts must take account of the principle that the conduct of foreign relations is "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952); see *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918). The Court has also recognized that the political Branches often must quickly respond to evolving international situations, and pending suits should not be permitted to impede their ability to conduct the Nation's foreign relations.[6] *Dames & Moore* v. *Regan*, 453 U.S. 654, 674 (1981).

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[6] Petitioner argues (Br. 50-54) that this Court should blind itself to the foreign-sovereign context in which this case arises because the court of appeals did not discuss that issue. That court had no occasion to do so, as petitioner did not raise its "single case" argument below. See note 3, *supra*. Respondents did argue below, however, that Congress had broad authority to regulate foreign sovereign immunity, Resp. C.A. Br. 12, and they continue to press

1. This Court has understood the Executive's case-specific foreign sovereign immunity determinations to be consistent with Article III

a. For much of our Nation's history, the Executive Branch had the authority to determine the immunity of foreign states in civil suits in courts of the United States on a case-by-case basis, and those determinations were binding on the courts. See *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 34-36 (1945). A foreign sovereign's immunity is grounded not in any constitutional entitlement, but instead arises out of principles of international law, reciprocity, and comity among sovereigns. *Altmann*, 541 U.S. at 689; *Verlinden B.V* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). In light of the potentially significant foreign relations consequences of subjecting another sovereign state to suit in our courts, the Court historically looked to "the political branch of the government charged with the conduct of foreign affairs" to decide whether immunity should be recognized in the particular case. *Hoffman*, 324 U.S. at 34. The Executive would make a determination based upon principles of immunity, informed by customary international law and reciprocal practice. *Verlinden*, 461 U.S. at 487.

This Court has described an Executive immunity determination as a "rule of substantive law governing the exercise of the jurisdiction of the courts." *Hoffman*, 324 U.S. at 36; see also *Ex parte Peru*, 318 U.S. 578, 588 (1943) (same). As a result, the Court has explained, it is "not for the courts to deny an immuni-

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that argument in this Court, Br. 4-5, 34, 50. This Court may consider a ground for affirmance presented below, whether or not the court of appeals addressed it. See *Dandridge* v. *Williams*, 397 U.S. 471, 475 (1970).

ty which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Hoffman*, 324 U.S. at 35; see also, *e.g. Ex parte Peru*, 318 U.S. at 588 ("the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction") (quoting *United States* v. *Lee*, 106 U.S. 196, 209 (1882)); *Compania Espagnola de Navegacion Maritimia, S.A.* v. *The Navemar*, 303 U.S. 68, 74 (1938).

The Executive's determination of the "rule of substantive law" of immunity, *Hoffman*, 324 U.S. at 36, would necessarily be made in the context of a particular claim against a sovereign, and therefore necessarily pertained only to the specific case in question. Such a determination, and the effect accorded to it by the court, were never thought to be a violation of Article III. Indeed, this Court has rejected the suggestion that "the President's determination of a foreign state's immunity" could be thought to be "an encroachment on [the federal courts'] jurisdiction" in violation of Article III. *Dames & Moore*, 453 U.S. at 684-685. The Court explained that the Executive's immunity determination permissibly "direct[s] the courts to apply a different rule of law"—necessarily in a single case. *Ibid.*

b. In 1976, Congress enacted the FSIA, which transferred from the Executive to the courts the principal responsibility for determining a foreign state's amenability to suit. *Verlinden*, 461 U.S. at 488-489. Although the FSIA establishes comprehensive "legal standards governing claims of immunity" that are generally applicable to all cases involving foreign-sovereign defendants, *ibid.*, Congress has on occasion

taken further steps to alter a foreign state's immunity with respect to ongoing litigation.

In 2003, in response to the institution of a new government in Iraq, Congress authorized the President to suspend the application of the FSIA's terrorism exception to Iraq in order to avoid burdening the new government with "crushing liability" for the terrorist acts of its predecessor. *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 852-853, 864 (2009) (quoting *Acree* v. *Republic of Iraq*, 370 F.3d 41, 61 (D.C. Cir. 2004) (opinion of Roberts, J.), cert. denied, 544 U.S. 1010 (2005)). The President exercised that authority for the express purpose of protecting Iraq's property from "attachment, judgment, decree, lien, execution, garnishment, or other judicial process." *Message to the Congress Reporting the Declaration of a National Emergency With Respect to the Development Fund for Iraq*, 39 Weekly Comp. Pres. Doc. 647 (May 22, 2003). That action, this Court recognized, altered the law governing two pending suits against Iraq, with the result that "immunity kicked back in" and "the District Court lost jurisdiction" over the suits. *Beaty*, 556 U.S. at 865. While neither the statutes at issue nor the President's action referenced specific pending cases by name, the express purpose of the political Branches' actions was to ensure that pending and potential claims against Iraq (whatever their number) did not undermine the United States' foreign policy in the region.

2. The political Branches may settle pending claims against foreign sovereigns or transfer them to a non-Article III tribunal

The political Branches' authority over claims of U.S. nationals against foreign sovereigns extends to dispos-

ing of those claims, including by removing them from Article III courts. Because "outstanding claims by nationals of one country against the government of another country" often may be "sources of friction between the two sovereigns," the President may settle or extinguish such claims in the exercise of his authority over foreign affairs. *Dames & Moore*, 453 U.S. at 679. Since the nineteenth century, the Executive Branch has entered into numerous executive agreements "renounc[ing] or extinguish[ing] claims of United States nationals against foreign governments in return for lump-sum payments or the establishment of arbitration procedures." *Id.* at 679-680 & n.8 (canvassing historical practice); see, *e.g.*, *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 415 (2003) (same); *United States* v. *Pink*, 315 U.S. 203, 227-228 (1942). Many of those settlements involved the claims of identified individuals arising out of a specific incident. See John Bassett Moore, *Treaties and Executive Agreements*, 20 Pol. Sci. Q. 385, 403-417 (1905).

The political Branches' authority to settle claims extends to those pending in court. In *Schooner Peggy*, this Court, relying on a treaty that was ratified while the case was pending before the Court, reversed a judgment holding that a captured vessel should be forfeited to the United States and private parties. The treaty provided that captured ships, "not yet definitively condemned, * * * shall be mutually restored" by each party. 5 U.S. (1 Cranch) at 107 (reporter's note). The Court observed that the treaty settling the claim "positively change[d] the rule which governs." *Id.* at 110.

In *Dames & Moore*, the Court rejected an Article III challenge to the President's authority to enter into

an executive agreement that suspended pending claims of U.S. nationals against Iran and provided for their submission to the Iran-United States Claims Tribunal. 453 U.S. at 684-685; Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (Feb. 24, 1981) (implementing agreement). This Court rejected the argument that "the President, by suspending [the plaintiff's] claims, has circumscribed the jurisdiction of the United States courts in violation of" Article III. 453 U.S. at 684. The Court explained that the President's settlement of the claims "has simply effected a change in the substantive law governing the lawsuit," much like an Executive suggestion of sovereign immunity. *Id.* at 685.

3. The political Branches have long regulated the legal status of specific foreign-state assets, including those involved in pending litigation

a. Since World War I, Congress has authorized the President, in times of war or national emergency, to regulate property in which a foreign enemy state has an interest, including by blocking it or, in certain circumstances, vesting title to it in the United States. See TWEA, 50 U.S.C. App. 2(b) and 5(b); IEEPA, 50 U.S.C. 1701 *et seq.* The Executive Branch invoked the power under TWEA to vest in the United States specific foreign-state assets. See, *e.g.*, *Propper* v. *Clark*, 337 U.S. 472, 474-476 (1949).

The purpose of statutes permitting blocking (or vesting) of foreign assets is "to put control of foreign assets in the hands of the President" so that he may dispose of them in the manner that best furthers the United States' foreign-relations and national-security interests. *Propper*, 337 U.S. at 493; see *Dames & Moore*, 453 U.S. at 673. By blocking assets, the Exec-

utive Branch "immobilize[s] the assets * * * so that title to them might not shift from person to person, except by license, until" the Executive Branch determines whether "those assets [are] needed for prosecution of [a] threatened war or to compensate our citizens or ourselves for the damages done by" the relevant foreign governments. *Propper*, 337 U.S. at 484.

In *Dames & Moore*, this Court upheld the President's authority under IEEPA to issue a series of orders and regulations that first blocked Iranian state assets that were the subject of litigation in federal and state court, and then subsequently "nullified" any intervening judicial attachment orders restraining the assets. 453 U.S. at 663-666; see Exec. Order No. 12,279, 46 Fed. Reg. 7919 (Jan. 19, 1981). In upholding the President's authority, the Court emphasized that the purpose of freezing foreign-state assets is to "maintain" them at the President's "disposal" for use as a "bargaining chip" in negotiations with a hostile country. 453 U.S. at 673. The Court therefore refused to adopt a construction of IEEPA that would permit "individual claimants throughout the country to minimize or wholly eliminate this 'bargaining chip' through attachments, garnishments, or similar encumbrances on property." *Ibid.*; see *Marschalk Co.* v. *Iran Nat'l Airlines Corp.*, 657 F.2d 3, 5 (2d Cir. 1981) (vacating attachment orders in accordance with the Court's decision in *Dames & Moore*).

b. The political Branches have previously taken control of particular identified foreign-state assets in order to compensate terrorism victims or satisfy the victims' judgments against foreign states. In 1996, acting under TWEA, the President "vest[ed] in the United States" $1.2 million in blocked Cuban assets

and directed payment "to surviving relatives of" individuals whose civilian airplanes were shot down over international waters by the Cuban Air Force. *Alejandre* v. *Republic of Cuba*, 96-10127 Doc. No. 61, at 42 (S.D. Fla. Dec. 30, 1998) (President William J. Clinton, Memorandum for the Secretary of the Treasury (Oct. 2, 1996)). And in 2000, Congress directed the President to use blocked property belonging to Cuba and Iran to make payments to certain individuals with terrorism-related judgments against those states. Victims of Trafficking and Violence Protection Act, Pub. L. No. 106-386, Div. C, § 2002, 114 Stat. 1541.

4. Functional considerations inform the political Branches' historical authority concerning claims against, and assets of, foreign sovereigns

Domestic litigation seeking compensation for wrongs committed by a foreign state against U.S. nationals can have significant implications for the Nation's relations with foreign sovereigns, as well as its interest in affording a means of compensation for injuries suffered by its nationals. See *Dames & Moore*, 453 U.S. at 673-674. The history of Executive and congressional control over claims against foreign states and foreign-state assets reflects the recognition that the political Branches must have the ability to address the various concerns raised by such litigation.

The political Branches often may need to employ narrow measures that are expressly limited to particular foreign-sovereign litigation or assets. See *Beaty*, 556 U.S. at 856-857 (recognizing that political Branches may alter a generally applicable statute to implement foreign-relations interests). Such targeted alterations to the governing legal framework enable the political Branches to craft nuanced responses to

particular international situations, while preserving flexibility to change course as events unfold or to draw distinctions between particular claims, states, or assets. Those measures will necessarily affect only a finite number of cases. In upholding the political Branches' ability to alter substantive rules of law governing defined sets of claims or assets, this Court has never suggested that the validity of such actions would turn on how many pending cases they affect. See pp. 22-26, *supra*. And with good reason: such an interpretation of Article III would permit the existence of pending litigation—and the happenstance that only a single case might be pending—to tie the hands of the political Branches in an arena in which flexibility and dispatch are crucial. See *Dames & Moore*, 453 U.S. at 673-674 & n.6.

II. SECTION 8772 IS CONSTITUTIONAL BECAUSE IT AMENDS THE LAW APPLICABLE TO ATTACHMENT OF PARTICULAR ASSETS OF A FOREIGN STATE AND DOES NOT DIRECT A RESULT BY A COURT UNDER THAT LAW

Section 8772 is a valid exercise of Congress's authority to regulate the disposition of specific foreign-state assets subject to the jurisdiction of the United States. The statute enables United States victims of terrorism to enforce existing judgments against Iran. It does so by altering the law applicable to Iran's claim of sovereign immunity and to particular property in which Iran has an interest.

For the reasons stated above, Section 8772 is not unconstitutional simply because it pertains to the assets at issue in a particular case. Nor does Section 8772 violate the rule set forth in *Klein*. Rather than directing a result under existing law, the statute al-

ters the governing law while preserving the courts' adjudicatory function. It is therefore consistent with the separation of powers.

A. Section 8772 Validly Alters The Law Applicable To This Case In The Exercise Of Congress's Control Over Foreign-State Assets

Section 8772 falls solidly within the political Branches' historic power to regulate the legal status of specific foreign-state assets in the United States and to prescribe a rule of decision for particular claims against a foreign sovereign. Petitioner's contention (Br. 52) that Section 8772 is unprecedented because it "altered *substantive* federal law—not just immunity"—is incorrect. Each of Section 8772's alterations in existing law has ample precedents in the political Branches' actions affecting cases involving foreign-state assets and claims involving those assets.

First, Section 8772 amends existing law by superseding any immunity from execution that Section 1611(b)(1) of the FSIA would have conferred on petitioner's assets by virtue of petitioner's status as the central bank of Iran. 28 U.S.C. 1611(b)(1); see Pet. Br. 11; Pet. App. 102a-104a. Section 8772 expressly subjects to execution "asset[s] of the central bank or monetary authority of the Government of Iran," notwithstanding "any provision of law relating to sovereign immunity." 22 U.S.C. 8772(a)(1)(C). That aspect of Section 8772 operates like a pre-FSIA Executive suggestion of non-immunity in a particular case. See *Petrol Shipping Corp.* v. *Kingdom of Greece*, 360 F.2d 103, 110 (2d Cir.), cert. denied, 385 U.S. 931 (1966); pp. 21-22, *supra*. While foreign states enjoyed a general rule of immunity in United States courts, the Executive Branch could "effect[] a change in the substantive

law governing the lawsuit," *Dames & Moore*, 453 U.S. at 685, by determining that the sovereign should not be immune in the particular case.

Second, Section 8772 alters the substantive law governing attachment of the assets in question. Petitioner relies on N.Y. U.C.C. Law § 8-112(c) (McKinney 2002), which provides that a creditor's interest in a debtor's security entitlement may be reached "only by legal process upon the securities intermediary with whom the debtor's securities account is maintained."[7] Pet. Br. 11. Section 8772 supersedes that standard, subjecting to attachment any financial asset in which Iran holds a beneficial interest and which satisfies certain other requirements.[8] 22 U.S.C. 8772(a)(1) and (a)(2)(A).

In that respect, Section 8772 alters the substantive law governing execution against assets in much the same way as does the operation of an Executive blocking regime. When the Executive blocks particular assets of a designated state sponsor of terrorism, that action alters the substantive law applicable to those assets, including by rendering them potentially subject to TRIA. Where it applies, TRIA broadens judgment holders' rights of attachment by making

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[7] The parties assumed that state law governs respondents' attachment in this case, and the courts did not consider whether state law or federal common law would govern. *Cf. OBB Personenverkehr AG* v. *Sachs*, No. 13-1067, slip op. 7 (Dec. 1, 2015). There is no need for the Court to resolve that question here.

[8] Petitioner contends in passing (Br. 28) that Section 8772 also changed existing law by "abrogat[ing]" the United States' obligations under the Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899, 1957 WL 52887. For the reasons stated in the United States' amicus brief filed at the certiorari stage (at 21-23), that argument is mistaken.

assets of juridically separate state agencies and instrumentalities attachable to satisfy a terrorism judgment against the foreign state. See § 201(a) and (d)(4), 116 Stat. 2337, 2340; pp. 3-4, *supra*. And TRIA aside, blocking programs often provide for the licensing of attachments of blocked assets by persons with claims against the foreign state. See *Dames & Moore*, 453 U.S. at 663. Indeed, the assets at issue in this case became blocked, pursuant to Executive action, while the case was pending. See p. 6, *supra*. Petitioner has not contended that that action violated Article III. In addition, Congress, or the President when authorized by Congress, could direct that blocked assets should be vested in the United States and thereafter paid to particular individuals, thereby altering substantive property rights in those assets.[9] See *Propper*, 337 U.S. at 483.

Finally, Section 8772's overall effect is to render specific blocked assets subject to attachment (upon a judicial finding that Iran, and no one else, possessed an interest in the assets) to satisfy judgments against Iran held by terrorism victims. Congress and the Executive have in the past used blocked assets to compensate U.S. citizens injured by wrongs committed by foreign sovereigns, see *Propper*, 337 U.S. at 483-484, including by vesting the assets in the United States and transferring them to identified claimants.

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[9] Petitioner observes (Br. 26) that "if other plaintiffs sought to execute against the same assets based on identical claims, their case would be subject to a completely different rule." Other plaintiffs holding separate judgments have, however, intervened in this action in order to assert their own claims against the assets. See Resp. Br. 8, 47.

See *ibid.* Section 8772 falls well within the ambit of that established authority.

B. Section 8772 Does Not Direct A Particular Outcome Under Existing Law

1. Section 8772 does not direct a result under existing law. See *Klein*, 80 U.S. (13 Wall.) at 147; pp. 12-14, *supra*. Instead, as petitioner acknowledges (Br. 26), Section 8772 "changes the law" by establishing new substantive standards. And it does so without directing the courts to apply the new standards in a particular way or reach any particular result. See *Plaut*, 514 U.S. at 218.

There is no question that Section 8772 leaves issues for the courts to adjudicate—indeed more issues than may be involved in typical proceedings to execute upon a final judgment. The statute provides that "the court shall determine" whether the financial assets at issue in this case meet the new standards Congress enacted. 22 U.S.C. 8772(a)(2). Before authorizing execution, the district court did just that. As required by Section 8772(a)(2)(A), the court determined that petitioner "holds equitable title to, or the beneficial interest in," the assets. The court rejected Clearstream's contention that "there are triable issues as to whether [petitioner] is the 'owner of' the assets," Pet. App. 111a, finding that Clearstream and UBAE maintained their accounts "on behalf of" petitioner, *id.* at 112a. The court also determined, as required by Section 8772(a)(2)(B), that no other party possesses a "constitutionally protected interest" in the assets. Although Clearstream argued that Section 8772 worked an unconstitutional taking without just compensation of its interest in its "alleged right to payment from Citibank," the court concluded that Clear-

stream had no constitutionally protected "investment-backed expectations" in the account. *Id.* at 117a-118a; see *id.* at 109a. Petitioner does not challenge those determinations here. In addition, as the district court's opinions reflect, it was uncontested that respondents had satisfied Section 8772's other elements. 22 U.S.C. 8772(a); Pet. App. 56a-64a.

2. Petitioner contends (Br. 42-50), however, that Section 8772 "*effectively* dictate[d]" the outcome in this case because the judicial findings contemplated by the provision concerned undisputed facts. *Id.* at 46-47. Even if it were accurate to characterize the entirety of the court's findings as undisputed, petitioner is wrong to suggest that the relevant question for Article III purposes is whether a statute "effectively" alters the likelihood of a particular outcome.

This Court has expressly rejected the argument that a statute impinges on the judicial power when it directs the courts to apply a legal standard to undisputed facts. The Court has explained that "[w]hen a plaintiff brings suit to enforce a legal obligation it is not any less a case or controversy upon which a court possessing the federal judicial power may rightly give judgment, because the plaintiff's claim is uncontested or uncontestable." *Pope*, 323 U.S. at 10-11. In upholding statutes that have altered the law governing pending cases, moreover, the Court has never suggested that the operative question is whether the statute "effectively" requires a particular result—even when the statute undoubtedly had a significant impact on the outcome. See *Robertson*, 503 U.S. at 435; *Wheeling Bridge*, 59 U.S. (18 How.) at 429; pp. 13-14, *supra*; accord *Schooner Peggy*, 5 U.S. (1 Cranch) at 109-110 (applying newly ratified treaty that, by re-

quiring the return of sovereign property captured but "not yet *definitively* condemned," effectively permitted only one possible outcome).

Petitioner's argument also makes little structural sense. Under its view, the constitutionality of a statute would turn on fortuities that may not be known until after the statute is enacted—namely, the extent to which the parties might contest the application of the new legal standard to the facts or dispute the facts themselves. Presumably even the substantiality of those disputes would be relevant under petitioner's framework, since the parties did dispute ownership in this case but petitioner argues the outcome was nonetheless a "foregone conclusion[]," Br. 47. Congress's ability to prescribe new legal standards for pending cases—particularly in the sensitive context of U.S. nationals' efforts to satisfy judgments against a foreign sovereign—should not turn on arbitrary and uncertain distinctions. Rather, Congress may change the law governing a pending case so long as it alters the applicable standard, leaving it to the courts to apply the law to whatever material facts the court finds. *Robertson*, 503 U.S. at 438.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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v.

DEBORAH PETERSON, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE UNITED STATES SENATE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

	Page
INTEREST OF AMICUS	1
STATEMENT	3
SUMMARY OF ARGUMENT	5
ARGUMENT	8
I. Section 8772 Does Not Intrude On The Judicial Function Because It Does Not Instruct The Court How To Rule, But Rather Changes The Law Applicable To The Claims Before The Court	8
II. Section 8772's Effect On A Single Pending Case Does Not Violate Article III	17
III. That Legislation May Effectively Determine The Outcome In A Pending Case Does Not Render It Unconstitutional	24
CONCLUSION	26

TABLE OF AUTHORITIES

CASES	Page(s)
Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990)	21
INS v. Chadha, 462 U.S. 919 (1983)	21
Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997)	13
Nat'l Coalition to Save Our Mall v. Norton, 269 F.3d 1092 (D.C. Cir. 2001)	23
Nixon v. Administrator, General Services Admin., 433 U.S. 425 (1977)	21
Paramino Lumber Co. v. Marshall, 309 U.S. 370 (1940)	18
Pennsylvania v. Wheeling and Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856)	*passim*
Peterson v. Islamic Republic of Iran, No. 10-civ-4518 (S.D.N.Y. Feb. 28, 2013).	4
Peterson v. Islamic Republic of Iran, 758 F.3d 185 (2d Cir. 2014)	25
Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995)	*passim*
Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (1992)	*passim*
United States v. Brown, 381 U.S. 437 (1965)	21

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Klein,
80 U.S. (13 Wall.) 128 (1872) ..... *passim*

United States v. Padelford,
76 U.S. (9 Wall.) 531 (1870) 10

CONSTITUTION

U.S. Const. art. I, § 9, cl. 3 ..... 7, 21

U.S. Const. amend. V 7, 21

STATUTES

Act of Aug. 4, 1790, ch. 37, 6 Stat. 3 19

Act of Apr. 25, 1808, ch. 63, 2 Stat. 498 19

Act of Apr. 20, 1810, ch. 24, 6 Stat. 89 20

Act of Mar. 3, 1813, ch. 62, 6 Stat. 119 21

Act of Feb. 22, 1816, ch. 19, 6 Stat. 158 21

Act of May 1, 1822, ch. 44, 6 Stat. 267 19

Act of May 7, 1822, ch. 66, 6 Stat. 268 19

Act of Feb. 21, 1823, ch. 13, 6 Stat. 280 21

Act of Feb. 5, 1825, ch. 8, 6 Stat. 320 19

Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, § 318, 103 Stat. 701 (1989) 15, 16, 23

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 232, 110 Stat. 1214 (1996) 3

TABLE OF AUTHORITIES—Continued

Page(s)

Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322 (2002) 4, 12

National Defense Authorization Act for FY2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3 (2008) 4

Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214 (2012) (codified at 22 U.S.C. § 8772 (2012)) ..... *passim*

§ 8772(a)(1) 13

§ 8772(a)(2) 13, 24

§ 8772(b) 14, 23

§ 8772(c) 14

§ 8772(d) 14

§ 8772(e) 14

2 U.S.C. § 288e(a) 2

2 U.S.C. § 288*l*(a) 2

Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 ..... 4, 12, 14

§ 1605A 12

§ 1610 12

Priv. L. No. 95-161, 92 Stat. 3858 (1978) 19

Priv. L. No. 96-29, 93 Stat. 1400 (1979) 20

Priv L. No. 98-9, 98 Stat. 3417 (1984) 20

Priv. L. No. 98-34, 98 Stat. 3430 (1984) 20

TABLE OF AUTHORITIES—Continued

Page(s)

Priv. L. No. 98-48, 98 Stat. 3435 (1984) 20

Priv. L. No. 99-18, 100 Stat. 4320 (1986) 20

Priv. L. No. 100-32, 102 Stat. 4857 (1988) .. 20

Priv. L. No. 105-3, 111 Stat. 2698 (1997) 20

Priv. L. No. 105-6, 112 Stat. 3666 (1998) 20

Priv. L. No. 105-10, 112 Stat. 3670 (1998) .. 20

MISCELLANEOUS

142 Cong. Rec. 7790, 7801 (1996) 3

158 Cong. Rec. S3321 (daily ed. May 21, 2012) 4, 5

S. Res. 333, 114th Cong. (2015), 161 Cong. Rec. S8610 (daily ed. Dec. 10, 2015)..... 2

Supreme Court Rule 37.4..... 2

General Index to the Laws of the United States of America From March 4, 1789 to March 3, 1827 (Samuel Burch, ed. 1828). 19

Laws of the United States of America, (compiled by John B. Colvin & Benjamin B. French) (Bioren and Duane ed., 1815-1845)..... 19

Charles E. Schamel, *Untapped Resources: Private Claims and Private Legislation in the Records of the U.S. Congress*, PROLOGUE, Vol. 27, No. 1 (1995), *available at* https://www.archives.gov/publications/prologue/1995/spring/private-claims-1.html 18

IN THE

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BANK MARKAZI, AKA THE CENTRAL BANK OF IRAN,
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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE UNITED STATES SENATE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

INTEREST OF AMICUS

This case presents the question whether a statute concerning the attachability of certain assets of the Central Bank of Iran in a pending federal case seeking to recover on judgments secured by victims of state-sponsored terrorism transgresses the separation of powers doctrine by infringing on the Article III judicial power. Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158,

126 Stat. 1214, 1258 (codified at 22 U.S.C. § 8772 (2012)) [hereinafter "section 8772"], provides that the assets at issue in this case are subject to execution or attachment to satisfy judgments against Iran for damages from injury or death caused by acts of terrorism or the provision of material support or resources for such acts. Petitioner Bank Markazi, aka the Central Bank of Iran, argues that Congress encroached on the Judicial Branch's power under Article III in enacting section 8772.

The Senate has a strong interest in defending the constitutionality of section 8772 and, more broadly, its authority to legislate with particularity, including in ongoing cases, as circumstances require. The Senate appears as amicus curiae to present its views that section 8772 is a constitutional exercise of Congress' legislative power that does not intrude upon the judicial power established under Article III of the Constitution.[1]

---

[1] This appearance is undertaken pursuant to S. Res. 333, 114th Cong. (2015), 161 Cong. Rec. S8610 (daily ed. Dec. 10, 2015), directing the Senate Legal Counsel to appear in the name of the Senate as amicus curiae under 2 U.S.C. § 288e(a), which authorizes the Senate to appear "in any court of the United States in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue." Permission to appear as amicus is "of right" and may be denied only for untimeliness. 2 U.S.C. § 288*l*(a). This brief is submitted in accordance with Supreme Court Rule 37.4, which provides that "[n]o motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative."

STATEMENT

This case arises from international terrorist acts committed by Iran against Americans, and legislation enacted by Congress to allow Americans to seek compensation for their injuries through suits against foreign governments responsible for terrorist acts. Almost twenty years ago, Congress took the first step to hold foreign governments accountable to Americans who have suffered injuries or death from terrorist acts those governments committed, sponsored, or supported. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 232, 110 Stat. 1214, 1243 (providing exception to foreign sovereign immunity for suits against designated state-sponsors of terrorism for injuries or death from acts of terrorism). The supporters of the 1996 law recognized the importance of allowing American victims of such heinous acts to seek justice for the terrible damage they have suffered. *See* 142 Cong. Rec. 7801 (1996) (statement of Sen. Robert Dole) ("This [legislation] is historic and will, at long last, allow American victims of terrorism to use U.S. courts to try to seek compensation for the vicious acts of terrorist states."); *id.* at 7790 (statement of Sen. Hank Brown) ("Sovereign immunity is an act of trust among nations of good faith. When a terrorist state harbors or supports known terrorists, or injures or kills American citizens, it destroys that trust and should not be allowed to avoid the accusations of those it harms.").

Because of the difficulty in executing judgments against foreign governments, allowing victims of terrorism to sue and be granted relief by the courts was not sufficient. Accordingly, in order to facilitate the ability of these victims to obtain their court-ordered compensation, Congress enacted various laws

to enable execution of those judgments against the blocked assets of terrorist parties found liable for the harm. *See, e.g.*, Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337 (2002) (authorizing execution of judgments against blocked assets of terrorist parties and their agencies and instrumentalities); National Defense Authorization Act for FY 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338-41 (2008) (authorizing attachment of assets of agency or instrumentality of foreign government for judgments in terrorism cases even where agency or instrumentality is separate legal entity).

The plaintiffs in this case are over a thousand victims of terrorist attacks sponsored by Iran and the representatives and surviving family members of those victims, *see* Bank Markazi's Petition for Writ of Certiorari at 52a-53a (Opinion and Order of district court in *Peterson v. Islamic Republic of Iran*, No. 10-civ-4518 (S.D.N.Y. Feb. 28, 2013)), including victims of the bombings of the Marine barracks in Lebanon in 1983 and Khobar Towers in Saudi Arabia in 1996. *See* 158 Cong. Rec. S3321 (daily ed. May 21, 2012) (statement of Sen. Menendez). These victims have joined together in this action to seek payment on billions of dollars of judgments that they have secured against Iran – in over 18 cases – from assets held in the United States for the benefit of Bank Markazi, the Central Bank of Iran.

After this action was filed, Congress passed the law challenged here, the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502, 126 Stat. 1214, 1258, which amended existing law under the Foreign Sovereign Immunities Act to remove the protection of sovereign immunity from the assets at issue here and to make clear that such assets

are available for attachment even if held by a financial intermediary. As the sponsor of this provision explained, Congress should deny to Iran and Iranian government instrumentalities the benefits of sovereign immunity as "Iran . . should not be able to avoid having its assets attached and pursued and executed upon as they killed Americans and hav[e] been part of killing Americans abroad." 158 Cong. Rec. S3321 (daily ed. May 21, 2012) (statement of Sen. Menendez). Bank Markazi now challenges this law as violating Article III of the Constitution.

SUMMARY OF ARGUMENT

Article I of the Constitution, as reflected in this Court's decisions and longstanding practice, gives Congress the power to enact legislation with narrow application, legislation that changes the law in a particular case, and legislation that imposes duties or creates rights that are clearly articulated and directly applicable to particular claims. None of those exercises of legislative power, either alone or together, transgresses the Judiciary's Article III power to rule on cases or controversies properly before it.

I. In defining the limitations imposed by Article III on the legislative power, this Court has held that Congress may not direct courts how to decide a particular case pending before them, *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1872), as such action intrudes on the judicial power reserved to that Branch. However, this Court has made clear that Congress may "amend applicable law" affecting a specific pending case – even conclusively – without violating Article III. *See Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (explaining that "[*Klein's*] prohibition does not take

hold when Congress amends applicable law") (internal quotation marks and citation omitted). In enacting section 8772, Congress did precisely that – it amended the law governing whether particular assets are attachable to satisfy the judgments held by victims of terrorism, establishing a new legal standard for attachment and execution of terrorism judgments against the assets in this case. Section 8772 neither dictates to the courts how to rule on plaintiffs' request to execute their judgments against these assets, nor directs the courts how to make determinations under the new standard for attaching these assets set out in that law.

The substance of Bank Markazi's challenge to section 8772 was previously rejected by the Court in *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429. In that case, the Court upheld the constitutionality of a statute that had changed the application of environmental laws in three related pending cases about timber harvesting in forests in Oregon and Washington during one fiscal year. The Court found that the statute in that case did not violate Article III because it "compelled changes in law, not findings or results under old law," and did not "direct any particular findings of fact or applications of law, old or new, to fact." *Id.* at 438. Like the statute in *Robertson*, section 8772 modifies existing law applicable to a pending case with a narrow application to the specific assets involved in this proceeding. As in *Robertson*, the statute here does not direct the courts how to rule on the claims before them, but rather amends the law governing attachment of the assets at issue. This Court should apply *Robertson* to the analogous law at issue here and uphold section 8772 as a proper exercise of legislative power that does not intrude on Article III.

II. Section 8772's focus on a single pending case does not violate Article III. Bank Markazi's argument that section 8772's narrow application "defies the Nation's history and traditions," Brief for Petitioner [hereinafter "Petitioner's Br."] at 29, is refuted by longstanding legislative practice. From the First Congress onward, Congress has enacted numerous laws with very specific applications to subjects as narrow as a single person or circumstance, *see infra* notes 9-13, including changing the law applicable to a single legal action, such as by extending statutes of limitations for one claim. *See infra* note 12. Such an extensive history of congressional legislation on specific individual claims belies any argument that a law is constitutionally suspect if it has a narrow scope or application.

While the Constitution assuredly contains provisions restricting Congress' power to enact certain types of particular legislation, *see, e.g.*, U.S. Const. art. I, § 9, cl. 3 (prohibiting Bills of Attainder); U.S. Const. amend. V (equal protection component of Due Process Clause), those provisions are not at issue here, and there is no support, in either the text of the Constitution or this Court's precedents, for imposing on Congress a principle of legislative generality under Article III or prohibiting legislation merely because it affects a single case. "Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid." *Plaut*, 514 U.S. at 239 n.9.

III. Bank Markazi's argument that, even if not facially directing a judicial ruling, section 8772 violates Article III because it "effectively dictate[s] the outcome of this case," Petitioner's Br. at 45, is meritless. Notwithstanding Bank Markazi's contention that the findings required by section 8772 for the

courts to order attachment of the assets are "foregone conclusions," *id.* at 47, the application of section 8772 in this case remains the responsibility of the Judiciary, as that section requires the courts' traditional exercise of independent judicial power to execute. That the required findings in section 8772 may be straightforward does not diminish the role the courts play in ordering any attachment or execution thereunder.

Under *Klein*, 80 U.S. 128, a law is unconstitutional if its provisions, *by their own terms*, direct the Judiciary how to rule in a particular case. Neither *Klein* nor any subsequent decision of this Court has held that a statute is unconstitutional if it changes applicable law so as *effectively* to compel a particular outcome in a pending case. Bank Markazi's argument that the effect of a statute on a specific pending case renders it unconstitutional cannot be squared with this Court's decisions in *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856) and *Robertson*, both of which upheld laws that effectively determined the outcome in specific pending cases.

ARGUMENT

I. SECTION 8772 DOES NOT INTRUDE ON THE JUDICIAL FUNCTION BECAUSE IT DOES NOT INSTRUCT THE COURT HOW TO RULE, BUT RATHER CHANGES THE LAW APPLICABLE TO THE CLAIMS BEFORE THE COURT.

Article III places two constraints on Congress' power to enact laws that affect specific cases: (1) Congress may not require the Judiciary to re-open final judgments of the Judicial Branch, *Plaut*, 514 U.S. at 240, and (2) Congress may not direct the courts how to rule in pending cases. *Klein*, 80 U.S. at 146. Such laws

violate Article III not because they are narrow in scope or affect ongoing cases, but because through such laws Congress seeks to participate in the exercise of the judicial power to decide cases or controversies. This Court has clarified that Congress may "amend applicable law" affecting a pending case, *Robertson v. Seattle Audubon Soc'y*, 503 U.S. at 441, without running afoul of *Klein*'s prohibition on directing how a court must rule in a particular case or *Plaut*'s restriction on directing the re-opening of final judgments. *Plaut*, 514 U.S. at 218 (explaining that "[*Klein*'s] prohibition does not take hold when Congress amends applicable law") (internal quotation marks and citation omitted).

In enacting section 8772, Congress did precisely that – it amended the law governing whether the assets at issue are attachable to satisfy the judgments held by victims of terrorism, establishing a new legal standard for attachment and execution of terrorism judgments against the assets in this case. Section 8772 neither dictates to the courts how to rule on plaintiffs' request to execute their judgments against these assets, nor does it direct the courts how to make the determinations under the new standard for attachment set out in section 8772. Accordingly, section 8772 does not violate Article III.

A. *Klein* remains the only case in which this Court has found that a law enacted by Congress infringed on the Judicial Branch by requiring courts to decide a case in a specific manner. In that case, the administrator of the estate of a former resident of the Confederacy brought an action seeking to recover the value of property seized by Treasury officials during the Civil War. Under applicable law, a person who had property seized by the United States Government during the war could seek to recover the value of the

property so long as the claimant could demonstrate that the claimant had never given aid or comfort to the rebellion. *Klein*, 80 U.S. at 139. Prior to *Klein*, this Court had held that, in evaluating whether a claimant met the standard for recovery, the claimant's receipt of a Presidential pardon conditioned on pledging an oath of allegiance to the United States served as proof of loyalty entitling the claimant to recover the value of the confiscated property. *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 542-43 (1870). Congress responded to the *Padelford* decision by enacting legislation directing that no pardon could be offered as evidence or used to establish the claim of a person to recover confiscated property, except that any recitation in the pardon that the person had taken part in the rebellion must be considered conclusive evidence that the person did not maintain true allegiance to the United States, in which case the court would be divested of jurisdiction and required to dismiss the suit. *Klein*, 80 U.S. at 133-34.

The Court found that such a direction to the Judicial Branch to dismiss actions before the courts "inadvertently passed the limit which separates the legislative from the judicial power." *Id.* at 147 [2] In explaining where this "separation" falls, the Court distinguished that law from the statute it had upheld earlier in *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856). *Wheeling Bridge* involved a decree of this Court finding a bridge over the Ohio River to constitute an obstruction to navigation and requiring the bridge be removed or elevated. After the bridge was damaged in a storm

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[2] The Court also held the statute invalid on the unrelated ground that it "infring[ed] the constitutional power of the Executive" by "impairing the effect of a pardon." *Klein*, 80 U.S. at 147.

and rebuilt, Pennsylvania, which had secured the injunction, moved to have the injunction enforced and the bridge removed. *Id.* at 424-28. In the interim, Congress had passed a law declaring the bridge a "lawful structure" and denominating it a post-road for the passage of U.S. mail, thereby making it, as a matter of law, no longer an obstruction to navigation subject to removal. *Id.* at 429; *Klein*, 80 U.S. at 146. Following the new law, the Court refused to enforce the judgment and dissolved the injunction, as the bridge was no longer an obstruction subject to removal because of the intervening law. *Wheeling Bridge*, 59 U.S. at 432, 435-36. The Court held that the law changing the bridge's legal status was a constitutional exercise of Congress' power, even though it effectively compelled a specific outcome in a single pending case. *Id.* at 431-32; *Klein*, 80 U.S. at 147.

Unlike in *Wheeling Bridge*, the statute in *Klein* did not simply amend the law applicable to the claims before the courts, but directed specific judicial rulings. The statute in *Klein* mandated that in any case where the Claims Court had rendered a judgment for a claimant based on a pardon issued to the claimant, the Supreme Court on appeal "shall dismiss the same for want of jurisdiction." 80 U.S. at 134. In addition, the statute required courts to "forthwith dismiss the suit" of any claimant who had received a pardon that had "issued without an express disclaimer of, and protestation against," the recitation in the pardon that the person took part in the rebellion or was disloyal to the United States. *Id.* Unlike in *Wheeling Bridge*, where Congress changed the law governing the matter, but left to the courts its application in the case, Congress' law regarding the effect of pardons specifically dictated to the courts how to rule on cases before them.

Post-*Klein*, the Court has recognized this distinction between congressional enactments directing judicial rulings on the one hand, which intrude on Article III, and those amending the law applicable to pending cases, as in *Wheeling Bridge*, which do not. *See Plaut*, 514 U.S. at 218 ("Whatever the precise scope of *Klein* . later decisions make clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'") (quoting *Robertson*, 503 U.S. at 441).

B. Because the provision challenged here, 22 U.S.C. § 8772, amends the law applicable to this case and does not direct courts to rule a certain way, it does not infringe on the judicial power in Article III. The law at issue in this action involves the immunity of foreign sovereigns and their property before the courts of the United States. To effectuate United States policy in this area, Congress has enacted laws governing the immunity of foreign sovereigns. *See* Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611. As part of this legal framework, Congress has mandated various exceptions to foreign sovereign immunity, *see, e.g.*, 28 U.S.C. § 1605A (terrorism exception to the jurisdictional immunity of a foreign state); 28 U.S.C. § 1610 (exception to immunity of property of a foreign state from attachment or execution), and has adjusted and modified those exceptions as it has deemed appropriate. *See* Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337-40 (2002) (regarding satisfaction of judgments from blocked assets of terrorists, terrorist organizations, and state sponsors of terrorism).

Section 8772 further modifies the law governing the immunity of assets of foreign sovereigns and their

instrumentalities.[3] Subsection (a)(1) provides that particular assets meeting three criteria "shall be subject to execution or attachment in aid of execution" to satisfy judgments against Iran for personal injury or death caused by certain terrorist activities or the support of such actions.[4] Subsection (a)(2) provides the standard for when those assets may be attached, that is, what conditions must be established before the courts may order attachment and execution against the assets identified in subsection (a)(1). Specifically, the statute requires that, prior to attaching or executing against these assets, the court must

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[3] Bank Markazi mischaracterizes this case as involving "tort claims between parties seeking billions of dollars of money damages." Petitioner's Br. at 39. Plaintiffs are not asking the court to find Bank Markazi liable for injuries they suffered from acts of terrorism or to "award" them damages. *Id.* at 25 (quoting *Lindh v. Murphy*, 96 F.3d 856, 872 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997)). These victims of terrorism and their families *already* have been awarded judgments for injuries they suffered from terrorist acts sponsored or supported by Iran. In this action, plaintiffs seek only to execute those judgments by attaching property held on behalf of the Central Bank of Iran, pursuant to Congress' determination in law as to whether such property is afforded immunity or is subject to attachment.

[4] The three criteria are that the asset is

> (A) held in the United States for a foreign securities intermediary doing business in the United States; (B) a blocked asset (whether or not subsequently unblocked) that is property described in subsection (b); and (C) equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran or any agency or instrumentality of that Government, that such foreign securities intermediary or a related intermediary holds abroad.

22 U.S.C. § 8772(a)(1).

determine that "Iran holds equitable title to, or the beneficial interest in, the assets" and that "no other person possesses a constitutionally protected interest in the assets."

The remaining parts of section 8772 clarify or support the application of the attachment and execution provision of subsection (a). Subsection (b) identifies with particularity the assets that are covered by subsection (a)(1), namely "the financial assets that are identified in and the subject of proceedings" in this case, and subsection (c) clarifies that this provision should not be construed to change the applicable law governing the right to satisfy judgments in other cases, nor to apply to assets other than those specifically identified in subsection (b).[5]

By its terms, section 8772 does not dictate to the courts how to rule in this case. Rather, it changes the applicable law that the courts must apply in determining whether the assets at issue are subject to attachment in execution of the plaintiffs' judgments, just as the statute in *Wheeling Bridge* altered the applicable law governing the legal status of the particular bridge at issue there and whether it was subject to removal. As such, section 8772 does not violate the prohibition in *Klein* on directing a particular ruling in a case.

The Court's decision in *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, rejecting a constitutional challenge under Article III to a narrowly tailored law that affected three specifically identified pending

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[5] The final two subsections of section 8772 define terms used in the section (subsection (d)) and provide technical amendments to the Foreign Sovereign Immunities Act (subsection (e)).

cases, is closely analogous and supports the constitutionality of section 8772. *Robertson* presented a challenge to timber harvesting in forests in Oregon and Washington managed by the federal government. *Id.* at 432. Those forests contained habitat of the northern spotted owl, which was listed as threatened under the Endangered Species Act. Environmental advocacy groups had sued to enjoin proposed timber sales for violating five statutes,[6] and a court had enjoined some of the proposed timber harvests and sales. *Robertson*, 503 U.S. at 432.[7] Congress responded to the ongoing litigation and the injunction by enacting section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, 103 Stat. 701, 745 (1989), to govern the harvesting of timber in these areas for Fiscal Year 1990. *Robertson*, 503 U.S. at 433-34.

Section 318 enacted a compromise allowing some timber harvesting, while at the same time expanding restrictions on harvesting in certain areas. *Id.* at 433. Section 318 provided for harvesting a set amount of timber in Fiscal Year 1990 and established environmental criteria for the government to follow in selecting sites for harvesting. The new law also prohibited harvesting from designated areas, establishing areas of protected spotted owl habitat during that fiscal year. 103 Stat. 745-47; 503 U.S. at 433. As the allowable amount of timber harvesting

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[6] The Migratory Bird Treaty Act, the National Environmental Policy Act of 1969, the National Forest Management Act of 1976, the Federal Land Policy and Management Act of 1975, and the Oregon California Railroad Land Grant Act.

[7] In addition to the two suits by environmental groups, a logging association filed a third suit challenging restrictions on timber harvesting in these forests.

under the statute necessitated harvesting from areas that were subject to the injunction, section 318 further provided that compliance with the management of the areas as set forth in that section would constitute

> adequate consideration for the purpose of meeting the statutory requirements that are the basis of the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al. v. Manuel Lujan, Jr., Civil. No. 87-1160-FR.

103 Stat. 747.

The environmental advocacy groups challenged section 318 as a violation of Article III, because, they claimed, it directed the outcome in pending suits, transgressing the rule established by *Klein*. *Robertson*, 503 U.S. at 436-37 This Court rejected that challenge, holding that section 318 did not encroach on Article III because that section "replaced the legal standards underlying" the pending suits, "without directing particular applications under either the older or the new standards." *Id.* at 437 As the new statute "compelled changes in law, not findings or results under old law," and did not "direct any particular findings of fact or applications of law, old or new, to fact," *id.* at 438, the Court upheld the law under Article III.

As in *Robertson*, section 8772 modifies existing law applicable to a pending case. In *Robertson*, the statute amended the application of five environmental statutes to the claims in three pending related suits;

here, section 8772 amends the law governing the immunity of the property of a foreign sovereign in this case. Like the law upheld in *Robertson*, section 8772 does not compel "particular findings of fact or applications of law . . . to fact," 503 U.S. at 438, nor does it "expressly provide[] for judicial determination," *id.* at 438-39, to attach these assets for execution of plaintiffs' judgments. Rather, it "compel[s] changes in law," *id.* at 438, and "replace[s] the legal standards underlying" this suit, *id.* at 437, leaving to the courts the application of those new standards. Accordingly, *Robertson*'s holding applies equally here, and this Court should likewise find that section 8772 does not intrude on the judicial power reserved by Article III.

II. SECTION 8772'S EFFECT ON A SINGLE PENDING CASE DOES NOT VIOLATE ARTICLE III.

While section 8772 is narrow in its application, that fact does not render it unconstitutional. Bank Markazi argues that section 8772's application to narrow circumstances – the particular assets at issue here – violates Article III because it changes the law for a single pending case, Petitioner's Br. at 25, thus usurping the judicial function. This Court has never invalidated a statute under Article III because it affects only a single pending case. Indeed, in *Robertson*, the Court found no constitutional problem with a statute that was limited in effect to a single fiscal year and altered the law applicable to three pending related cases. The Court has termed "[t]he premise that there is something wrong with particularized legislative action questionable," noting that "[e]ven laws that impose a duty or liability upon a single individual or firm are not on that account invalid" as infringing on Article III. *Plaut*,

514 U.S. at 239 n.9; *cf. Paramino Lumber Co. v. Marshall*, 309 U.S. 370, 380 (1940) ("[The Constitution] contains no provision against private acts enacted by the Federal government except for a prohibition of bills of attainder and grants of nobility.").[8]

Bank Markazi nevertheless argues that the narrow scope of section 8772 "defies the Nation's history and traditions," Petitioner's Br. at 29, in particular, as asserted by their amici, the "principle of legislative generality." Br. of Amici Federal Courts Scholars at 25. Consistent practice from the First Congress onward refutes the claim of a constitutional tradition or principle of legislative "generality." From the earliest days under the Constitution, Congress has passed bills with applications to subjects as narrow as a single person or circumstance.[9] These "private bills"

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[8] In *Paramino Lumber* the Court upheld legislation affecting the claim of a single individual. In that case, the Paramino Lumber Company and its insurer paid compensation to an employee longshoreman who had been injured while working. The employee then applied under the Employees' Compensation Act to the Compensation Commission, which determined that he had been wholly disabled for a period until he recovered and that he had been paid all compensation due. 309 U.S. at 374-75. Subsequently, the employee was diagnosed with further injury, necessitating additional medical treatment. *Id.* at 376. Almost five years after the original determination, Congress passed a law directing the Compensation Commission to review the previous determination and issue a new compensation order. *Id.* at 375 n.3. The Court upheld the law against a challenge by the company and its insurer that the statute violated due process and was a usurpation of the judicial function. *Id.* at 378-81.

[9] One researcher has calculated that "private legislation accounted for 24% of the laws enacted by Congress" from 1789 to 1813 and "over 35% of all legislation enacted in 74 of the 79 Congresses between 1814 and 1971." Charles E. Schamel,

have adjusted legal relations of specifically named individuals far beyond simply paying or indemnifying against claims, as asserted by Bank Markazi (Petitioner's Br. at 40-41).[10] Moreover, this legislative practice has continued up to the present day.[11]

Untapped Resources: Private Claims and Private Legislation in the Records of the U.S. Congress, PROLOGUE, Vol. 27, No. 1 (1995), *available at* https://www.archives.gov/publications/prologue/1995/spring/private-claims-1.html. The designation of laws as "private" or "public" is not of constitutional significance to either the Article I power of Congress or the Article III jurisdiction of the Judiciary. It is the same legislative power at issue, regardless of its categorization, and is subject to the same constitutional constraints.

Indeed, laws were not initially classified as "public" or "private" when enacted. When the first several volumes of Statutes at Large were published in 1845, private legislation was collected in a separate Volume 6. Before then, the index of federal laws compiled by the Clerk of the House contained all acts of Congress, including laws "of a private or local nature," *General Index to the Laws of the United States of America From March 4, 1789 to March 3, 1827* (Samuel Burch, ed. 1828), which had been published sequentially, by date of enactment. *See Laws of the United States of America*, vols. I-X (compiled by John B. Colvin & Benjamin B. French) (Bioren and Duane ed., 1815-1845).

[10] *See, e.g.*, Act of Aug. 4, 1790, ch. 37, 6 Stat. 3 (remitting duties paid by two named individuals on imported goods destroyed by flood); Act of April 25, 1808, ch. 63, 2 Stat. 498 (providing for suits in law or equity to establish claims against bills drawn in favor of four named persons to be commenced by a date certain); Act of May 1, 1822, ch. 44, 6 Stat. 267 (restoring rights and privileges to one identified ship, notwithstanding navigation law); Act of May 7. 1822, ch. 66, 6 Stat. 268 (releasing individual sureties of a named taxpayer from all demands and executions or process or taxes under any law passed after date certain); Act of Feb. 5, 1825, ch. 8, 6 Stat. 320 (authorizing issuing letter patent to one named individual).

[11] *See, e.g.*, Priv. L. No. 95-161, 92 Stat. 3858 (1978) (directing Attorney General to cancel warrants of deportation and arrest of

Indeed, Congress has provided for changes in law applicable to a single legal claim or action, including extending statutes of limitations and establishing jurisdiction in a particular federal court for an individual's claim[12] and discharging persons from imprisonment on debts owed to the government,[13] all

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named alien and granting relief from deportation); Priv. L. No. 98-34, 98 Stat. 3430 (1984) (providing for extension of single identified patent); Priv. L. No. 98-48, 98 Stat. 3435 (1984) (relieving liability of religious organization for sale of hospital to for-profit corporation); Priv. L. No. 105-3, 111 Stat. 2698 (1997) (deeming named person naturalized citizen of United States as of Aug. 8, 1942 for purposes of eligibility under international agreement); Priv. L. No. 105-6, 112 Stat. 3666 (1998) (waiving grounds for removal of, or denial of admission to, named alien notwithstanding any order terminating his status as lawfully admitted permanent resident); Priv. L. No. 105-10, 112 Stat. 3670 (1998) (directing Attorney General to naturalize named disabled applicant for citizenship without administering required oath).

[12] *See, e.g.*, Priv. L. No. 96-29, 93 Stat. 1400 (1979) (providing for jurisdiction in U.S. Dist. Ct. for E.D. Cal. "notwithstanding the time limitation in [28 U.S.C. § 2401(b)] or any other provision of law" for claim of specific individual filed within six months of enactment and requiring that any such claim "shall be considered to have been filed in a timely manner"); Priv. L. No. 98-9, 98 Stat. 3417 (1984) (conferring jurisdiction on U.S. Dist. Ct. for D. Mass. over review of decision of board regarding discharge of railroad employee and declaring that any previous decision of district court shall not be a bar to this review nor shall be considered in rendering judgment); Priv. L. No. 99-18, 100 Stat. 4320 (1986) (providing for extension of time for named individual to present claim to federal agency and for jurisdiction in U.S. Dist. Ct. for N.D. Ohio to hear appeal on his claim); Priv. L. No. 100-32, 102 Stat. 4857 (1988) (providing for jurisdiction in U.S. Court of Claims for named individual's claims notwithstanding limitations period set out in statute).

[13] *See, e.g.*, Act of Apr. 20, 1810, ch. 24, 6 Stat. 89 (directing U.S. Marshal to discharge named individual from imprisonment on execution of judgment on behalf of United States, unless any

of which affect the application of judicial power in particular cases under Article III. Hence, any argument that "legislation may invade the judicial province when it lacks a general character," Br. of Amici Federal Courts Scholars at 19, is negated by the extensive practice of legislating on individual rights and claims throughout the Nation's history. While the Constitution assuredly has provisions regarding particularity in legislation, such as those prohibiting bills of attainder, U.S. Const. art. I, § 9, cl. 3, or mandating equal protection of the laws, U.S. Const. amend. V, those provisions are not at issue here.[14]

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person entitled to part of judgment against individual objects and pays cost of further imprisonment); Act of Mar. 3, 1813, ch. 62, 6 Stat. 119 (discharging three named individuals from imprisonment on judgment against them in United States' favor, if they assign and convey property to be held to satisfy judgments against them); Act of Feb. 22, 1816, ch. 19, 6 Stat. 158 (requiring discharge of named individual from imprisonment imposed on judgment for debt to United States); Act of Feb. 21, 1823, ch. 13, 6 Stat. 280 (authorizing discharge of named person from imprisonment for judgment in favor of United States and allowing new trial).

[14] To support their claim of a principle of legislative generality, Bank Markazi's amici rely on cases involving constitutional provisions other than Article III. Br. of Amici Federal Courts Scholars at 20-23 (citing *Nixon v. Administrator, General Services Admin.*, 433 U.S. 425 (1977) (Bill of Attainder, Equal Protection Clause, encroachment on Executive Branch); *United States v. Brown*, 381 U.S. 437 (1965) (Bill of Attainder); *INS v. Chadha*, 462 U.S. 919 (1983) (violation of Article I requirements for exercise of legislative power); *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) (Equal Protection Clause)). Consideration of these other provisions simply sheds no light on whether Article III imposes a duty of generality on exercises of legislative authority like that here, which is not alleged to violate those other provisions.

Further, the fact that legislation narrow in scope affects a claim in a pending case does not make it problematic under Article III. The power of Congress to legislate regarding specific circumstances and particular claims is not extinguished merely because the claim Congress is addressing has been filed at the time the law is enacted – otherwise the Court would have ruled the other way in *Wheeling Bridge* and *Robertson*, both of which involved statutes that adjusted the law applicable to specific pending cases.[15] As the District of Columbia Circuit observed in applying this Court's precedents to reject a challenge to a statute that changed the law applying to the claim underlying a pending legal action, "In view of *Plaut*,

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[15] Bank Markazi attempts to distinguish *Wheeling* and *Robertson* by arguing that section 8772, unlike the laws in those cases, has no "meaningful prospective effects." Petitioner's Br. at 35-39. Yet, this Court's decision in *Plaut* forecloses that argument. The statute in *Plaut*, which became law on December 18, 1991, established a limitations period applicable to private securities fraud suits that had been filed prior to June 19, 1991. Accordingly, the statute, by its very terms, had no "meaningful prospective effect" as it only applied to lawsuits that had been filed prior to the statute becoming law. Nevertheless, this Court did not express any concern with that statute's application to pending cases, noting that "[w]hen a new law makes clear it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." *Plaut*, 514 U.S. at 226; *see also id.* at 238-39 (noting that the fact that "the class of actions identified by [the challenged statute] could have been more expansive and the provision could have been written to have prospective as well as retroactive effect" was irrelevant to whether it infringed on the judicial power). Rather, the Court found problematic the statute's application only to cases that had already reached final judgment, as opposed to pending cases, because it "command[ed] the federal courts to reopen" those cases. *Id.* at 219.

Miller v. French[, 530 U.S. 327 (2000)] and *Wheeling Bridge*, we see no reason why the specificity should suddenly become fatal merely because there happened to be a pending lawsuit." *Nat'l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001). There is no support, in either the text of the Constitution, the history of legislative practice under the Constitution, or this Court's precedents, for imposing a principle of legislative generality under Article III invalidating legislation because it affects a single case.

Both Bank Markazi and the Amici Federal Courts Scholars also highlight the fact that section 8772 references the assets it covers by expressly citing the caption and case number of this case, in which those assets are at issue. Petitioner's Br. at 25; Br. of Amici Federal Courts Scholars at 17 However, the statute in *Robertson* also explicitly referenced the pending cases affected by caption and number, *see* Pub. L. No. 101-121, § 318(b)(6)(A), 103 Stat. 701, 747, yet the Court was untroubled by the reference. *Robertson*, 503 U.S. at 440. Bank Markazi points out that the Court noted in *Robertson* that the reference to specific cases "served only to identify the five 'statutory requirements that are the basis for' those cases." Petitioner's Br. at 38 (quoting *Robertson*, 503 U.S. at 440). But just so here: the reference in section 8772(b) to a specific pending action serves to identify with particularity the assets covered by the statute – the assets that are the "basis for" this case – and, as in *Robertson*, raises no Article III concerns.

III. THAT LEGISLATION MAY EFFECTIVELY DETERMINE THE OUTCOME IN A PENDING CASE DOES NOT RENDER IT UNCONSTITUTIONAL.

As explained above, section 8772 does not direct courts how to rule in a pending case, but rather changes the law to be applied by the courts to the claims in this case. Bank Markazi argues that section 8772 violates Article III by "effectively dictat[ing] the outcome of this case," because the findings required by section 8772 before ordering attachment of the assets are minor and "foregone conclusions." Petitioner's Br. at 45-47. This argument is meritless.

First, Bank Markazi's argument is nothing less than a claim that because the application of section 8772 is clear, it is constitutionally objectionable. Such reasoning is misguided. Indeed, the hallmark of effective legislation is clarity, and the fact that courts may easily apply a law does not make it constitutionally suspect. The important point is that, no matter how clear its terms, application of section 8772 remains the responsibility of the Judiciary, as that section requires the courts' independent exercise of judicial power. That the two findings required by section 8772 as a condition for attaching the assets at issue may be straightforward does not diminish the role the courts must play in determining whether to order any attachment or execution thereunder. Bank Markazi's argument that the required judicial findings are "foregone conclusions," Petitioner's Br. at 47, as "Congress . knew full well what impact § 8772 would have on the outcome of this case," *id.* at 48, is beside the point. Merely because the facts as developed in this case may make the findings in section 8772(a)(2) easier to anticipate does not

undermine Congress' power to enact legislation specifically governing the attachment of these assets. As the court below noted, "it would be unusual for there to be more than one likely outcome when Congress changes the law for a pending case with a developed factual record." *Peterson v. Islamic Republic of Iran*, 758 F.3d 185, 192 (2d Cir. 2014).

Bank Markazi's argument that section 8772 is unconstitutional because it "effectively" dictates the outcome in a pending case also fails because it misstates the applicable test under *Klein*. Under that case, a law is unconstitutional if its provisions, by their own terms, direct the judiciary to rule a particular way in a specific case. Neither *Klein* nor any subsequent decision from this Court has held that a law is unconstitutional if it *effectively* requires a particular outcome in a pending case.

The Court's decisions in *Wheeling Bridge* and *Robertson* both refute Bank Markazi's attempt to stretch *Klein*'s holding. In *Wheeling Bridge*, the Court upheld a law declaring a bridge that had been found unlawful by the Court to be a lawful "post-road," making it no longer an obstruction to navigation legally subject to removal. 59 U.S. at 429-30. By declaring the bridge a lawful post-road, the law effectively overturned this Court's injunction and resolved the pending dispute over removal of the bridge. Similarly, in *Robertson*, by declaring that compliance with the new law's timber harvesting provisions and management scheme constituted compliance with the various applicable environmental statutes, the law Congress enacted effectively dictated the outcome in those cases – removal of the injunction and rejection of those claims. The Court upheld the laws in both cases even though they "effectively"

dictated the outcome of specific pending cases. Hence, the Court's decisions in *Wheeling Bridge* and *Robertson* foreclose Bank Markazi's argument that section 8772 violates Article III because it effectively dictates the outcome of this case.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below and sustain the constitutionality of section 8772.

Respectfully submitted,

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No. 14-770

In The

Supreme Court of the United States

BANK MARKAZI, aka THE CENTRAL BANK OF IRAN,

Petitioner,

v.

DEBORAH PETERSON, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF AGUDAS CHASIDEI CHABAD AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION 3

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. AFFIRMANCE OF THE DECISION BELOW FOLLOWS *A FORTIORI* FROM THIS COURT'S UNANIMOUS DECISION IN *ROBERTSON v. SEATTLE AUDUBON SOCIETY* 6

II. *PLAUT v. SPENDTHRIFT FARM, INC.*, IS INAPPOSITE BECAUSE SECTION 8772 DOES NOT ALTER FINAL COURT JUDGMENTS 8

III. THIS CASE IS NOT AFFECTED BY *UNITED STATES v. KLEIN* 9

IV *NIXON v. ADMINISTRATOR* DEMONSTRATES THAT LEGISLATION MAY DIRECT THE DISPOSITION OF ONE PERSON'S PRIVATE PROPERTY 10

CONCLUSION 11

TABLE OF AUTHORITIES

Cases ***Page***

Agudas Chasidei Chabad of United States v. Russian Federation, 466 F Supp. 2d 6 (D.D.C. 2006) 2

Agudas Chasidei Chabad v. Russian Federation, 528 F.3d 934 (D.C. Cir. 2008) 2

Agudas Chasidei Chabad of United States v. Russian Federation, 798 F. Supp. 2d 260 (D.D.C. 2011) 3

Alliance for the Wild Rockies v. Salazar, 672 F.3d 1170 (9th Cir. 2012) 9

Bates v. Kimball, 2 Chipman 77 (Vt. 1824) 8

Nixon v. Administrator of General Services, 433 U.S. 425 (1977) 6, 10, 11

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) 5, 8

Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992) 5, 6, 7, 9

Seattle Audubon Society v. Robertson, 914 F.2d 1311 (9th Cir. 1990) 7

TABLE OF AUTHORITIES

Cases *Page*

United States v. Klein,
80 U.S. (13 Wall.) 128 (1872) 6, 9, 10

Statutes

22 U.S.C. § 8772 ..... *passim*

28 U.S.C. §§ 1602-1611 2

28 U.S.C. § 1610 ..... 3, 4

IN THE

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No. 14-770

BANK MARKAZI,
AKA THE CENTRAL BANK OF IRAN,

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DEBORAH PETERSON, *et al.,*

Respondents.

BRIEF OF AGUDAS CHASIDEI CHABAD AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS[1]

Agudas Chasidei Chabad ("Chabad") is the policy-making and umbrella organization for the Chabad-Lubavitch Chasidic Jewish spiritual movement and organization founded in Russia in the Eighteenth Century Chabad submits this brief *amicus curiae*

[1] Pursuant to Supreme Court Rule 37.6, *Amicus* certify that no counsel for a party authored this brief in whole or in part. No person or party other than the *Amicus* or their counsel has made a monetary contribution to this brief's preparation or submission. All parties have consented to the filing of this amicus brief.

because the issue presented for this Court's decision in this case may affect the *amicus*' ability to enforce a district court judgment that directed the Russian Federation and its instrumentalities ("Russia") to deliver to Chabad the 12,000 books and manuscripts seized by the Bolsheviks between 1917 and 1925 (the "library"), and 25,000 pages of documents and other materials compiled by Chabad's religious leaders seized by the Nazis and subsequently by the Soviet armed forces in Poland at the conclusion of World War II (the "archive").

After years of unsuccessful diplomatic negotiation with the Soviet Union and thereafter with the Russian Federation, Chabad filed a lawsuit on November 9, 2004, under the Foreign Sovereign Immunities Act (28 U.S.C. §§ 1602-1611) ("FSIA"), to recover the archive and library. Russia initially appeared in the lawsuit and objected to the district court's jurisdiction under the FSIA. The district court rejected Russia's position with respect to the archive but sustained it with respect to the library *Agudas Chasidei Chabad of United States v. Russian Federation*, 466 F. Supp. 2d 6 (D.D.C. 2006) (Lamberth, J.). On Russia's appeal and Chabad's cross-appeal, the United States Court of Appeals for the District of Columbia Circuit held that there was potential jurisdiction under the FSIA over Chabad's claims to both the archive and the library. *Agudas Chasidei Chabad v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008).

Following remand of the case to the district court, Russia announced that it would no longer participate in the litigation. Chabad then presented evidence to the district court, and the district court entered a

default judgment in Chabad's favor. The district court ordered Russia to deliver the archive and library to Chabad or to the United States Embassy in Moscow.

Russia refused to comply. After unsuccessful extra-judicial efforts in which the Department of State participated, Chabad sought a civil contempt order. The district court found Russia to be in civil contempt and ordered a civil contempt remedy of $50,000 per day for continued refusal to comply with the district court's order. *Agudas Chasidei Chabad of United States v. Russian Federation*, 798 F. Supp. 2d 260, 264-65 (D.D.C. 2011).

On September 10, 2015, the district court entered an Order granting Plaintiff's Motion for an Interim Judgment of Accrued Sanctions against Russia in the amount of $47.3 million for its civil contempt. Chabad has been attempting to find assets that can be attached pursuant to 28 U.S.C. § 1610 in order to execute on that judgment. Efforts may be made to legislate an amendment to the FSIA that would facilitate such recovery.

INTRODUCTION

Petitioner Bank Markazi has presented a broad question to this Court: "Whether a statute that effectively directs a particular result in a single pending case violates the separation of powers." This *amicus curiae* submits that the Question Presented by Bank Markazi is too broadly framed. This case truly presents a much narrower issue that determines the proper result: "Whether Congress may enact a statute that, in specified litigation, modifies statutory limitations impeding execution of

a money judgment against the assets of a foreign sovereign." The Court need not reach the broad question that Bank Markazi has presented but should decide the case with an affirmative response to the more narrow issue and affirm the decision of the Court of Appeals for the Second Circuit.

Congress has not decided the merits of any litigation in the statute that Bank Markazi challenges. Congress has not directed by statute that a particular plaintiff prevails in a dispute with a particular defendant. All that Section 8772 does is to remove pre-existing statutory barriers that made it difficult – maybe impossible – to reach Bank Markazi's assets to pay judgments that the trial court had entered. The fact that the law applies only to a "single pending case" (if the joined claims of 19 separate actions for thousands of terrorism victims can be called a "single" case) does not, under this Court's decisions, diminish Congress' legislative authority to affect an ongoing lawsuit by modifying onerous statutory pre-conditions for execution of a money judgment that Congress and the New York Legislature had previously prescribed and that continue to apply to cases other than those specifically identified.

This *amicus* currently holds a civil contempt judgment of more than 47 million dollars against Russia because, after litigating and losing, Russia contemptuously refused to comply with a district court order. Finding Russian assets in the United States that satisfy the exacting standards of 28 U.S.C. § 1610 is not an easy task. If Congress were to determine that these imposing standards should be modified to facilitate collection of a judgment that

(a) vindicates the district court and the judicial process, and (b) demonstrates to a foreign sovereign subject to jurisdiction under the Foreign Sovereign Immunities Act that court orders may not be blithely ignored, it could enact legislation making Russian assets in the United States accessible to Chabad. Such a statute would "effectively direct a particular result in a single pending case," but it would easily pass muster under the test that this Court has imposed in prior decisions. This Court should affirm the decision below because the Court of Appeals for the Second Circuit correctly decided that Congress may constitutionally enact a law that would facilitate execution of a money judgment in a particular civil lawsuit against a foreign sovereign.

SUMMARY OF ARGUMENT

1. Affirmance of the Second Circuit's decision follows *a fortiori* from this Court's unanimous ruling in *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992). Whereas the statute at issue in *Robertson* appeared to direct certain findings of fact in specifically designated cases, thereby replacing a court's fact-finding duty with Congress' edict, Section 8772 is not phrased in similar terms and does not substitute Congress' judgment for a judicial finding.

2. Section 8772 does not erase or alter in any way a final court judgment, as did the law invalidated in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). The challenged law in this case affects only the plaintiffs' ability to execute on judgments they have won.

3. If *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), still has current vitality, that decision does not invalidate a law that assists plaintiffs in enforcing court judgments rather than forecloses the rights of plaintiffs who, by governmental action, have been granted the right to recover their own captured or abandoned property.

4. This Court's opinion in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), confirms the power of Congress to engage in "nonpunitive legislative policymaking" that transfers ownership of private property from only one named person.

ARGUMENT

I.

AFFIRMANCE OF THE DECISION BELOW FOLLOWS *A FORTIORI* FROM THIS COURT'S UNANIMOUS DECISION IN *ROBERTSON v. SEATTLE AUDUBON SOCIETY*

Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992), concerned a federal statute that declared "management of areas on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon is *adequate consideration for the purpose of meeting the statutory requirements* that are the basis for" two specified federal lawsuits, identified by the captions of the cases, including docket numbers. (Emphasis added.) This Court unanimously held that this statutory provision "compelled changes in law, not findings or results under old law." 503 U.S. at 438.

On its face, the challenged statute in *Robertson* expressed Congress' finding that, in the cited cases, courts must deem certain "management" activity to be "adequate consideration" to satisfy certain statutory prerequisites. Whether statutory criteria have been satisfied by the conduct of parties seeking benefits under a statute is ordinarily a factual issue that the judiciary, not the executive or the legislature, must resolve on the record of an individual case. On this account, the court of appeals held in *Robertson* that the challenged statute "directs the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court." *Seattle Audubon Society v. Robertson*, 914 F.2d 1311, 1316 (9th Cir. 1990).

This Court reversed the court of appeals' decision unanimously. This Court held that notwithstanding the language and tenor of the law, Congress was not ordering courts to make findings of fact on the record before them. Congress was, according to the unanimous decision of this Court, directing "a change in law, not specific results under old law." 503 U.S. at 439.

In this case Section 8772 does not, as the statute did in *Robertson*, fill an evidentiary void with a Congressional finding. Section 8772 is entirely forward-looking. It directs that assets defined in subsection (b) "shall be subject to execution or attachment in aid of execution in order to satisfy any judgment " Unlike the statute challenged in *Robertson*, Section 8772 does not purport to substitute a Congressional finding for a finding that must, in other comparable cases, be made by a court.

Consequently, Section 8772 is most assuredly a constitutionally permissible "change in law."

II.

PLAUT v. SPENDTHRIFT FARM, INC., IS INAPPOSITE BECAUSE SECTION 8772 DOES NOT ALTER FINAL COURT JUDGMENTS

In *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), this Court held that Congress may not constitutionally direct the retroactive reopening of court judgments that had dismissed complaints barred by the statute of limitations. The Court's majority opinion noted that from the earliest days of the Republic the constitutional separation of legislative and judicial powers barred Congress from interfering with the final judgments of federal courts. "The power to annul a final judgment was 'an assumption of Judicial power,' and therefore forbidden." 514 U.S. at 224, quoting from *Bates v. Kimball*, 2 Chipman 77 (Vt. 1824).

This case does not concern a law that erases or modifies any final court judgment. Indeed, Section 8772 has the opposite effect; it furthers and facilitates court judgments that have granted damage awards to many victims of terrorism who, without Section 8772, could not secure their rights. Moreover, under the separation-of-powers standards applied by Justice Breyer in his concurring opinion in *Plaut* (514 U.S. at 240-246) and by Justices Stevens and Ginsburg in their dissent (514 U.S. at 246-266), Section 8772 passes constitutional muster.

III.

THIS CASE IS NOT AFFECTED BY *UNITED STATES v. KLEIN*

Bank Markazi contends that *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), created a constitutional rule that bars statutes that "direct the outcome of specific cases." Brief for Petitioner 43. On this basis it contends that Section 8772 exceeds Congress' designated authority. The precise rationale of *United States v. Klein* is murky, and the Court's opinion in *Klein* never explicitly articulates the unconditional prohibition against "dictating the outcome of a pending case" that Bank Markazi invokes.

In a decision rendered after its *Robertson* holding was reversed by this Court, the Court of Appeals for the Ninth Circuit observed that "*Klein* has remained an isolated Supreme Court application of the separation of powers doctrine to strike down a statute that dictated the result in pending litigation." *Alliance for the Wild Rockies v. Salazar*, 672 F.3d 1170, 1173 (9th Cir. 2012). The Ninth Circuit – which had relied heavily on *Klein* in the *Robertson* holding that this Court unanimously reversed – held *Klein* inapplicable and applied in *Alliance for the Wild Rockies* a Congressional amendment that retroactively removed a distinct population of gray wolves in the northern Rocky Mountains from the protections of the Endangered Species Act.

Whatever may be the holding of *Klein* and its continuing validity today, that decision has no application to this case. Section 8772 facilitates

recovery of judgments that a district court has entered in favor of terrorism victims. The Congressional enactment that was struck down by this Court in *Klein* retroactively denied to pardoned Confederate sympathizers the right to reclaim their captured or abandoned property. If a Congressional law had hypothetically done the opposite of the objective that Section 8772 actually achieves – if Congress had, by legislative fiat, invalidated all judgments won in district courts by victims of terrorism against Iran – *United States v. Klein* might be cited as a parallel instance to void such a statute. In fact, however, the decision in *Klein* has no bearing on this case.

IV.

NIXON v. ADMINISTRATOR DEMONSTRATES THAT LEGISLATION MAY DIRECT THE DISPOSITION OF ONE PERSON'S PRIVATE PROPERTY

Nixon v. Administrator of General Services, 433 U.S. 425 (1977), concerned a statute that gave complete possession and control of the property of one person – a former President of the United States – to the Administrator of General Services. This Court considered and rejected various challenges to the Presidential Recordings and Materials Preservation Act, including the contention that the law amounted to a constitutionally prohibited Bill of Attainder.

The Court could have rejected the Bill of Attainder claim entirely on the ground that the taking of President Nixon's papers was not

"punishment." See 433 U.S. 469-477. The Court's decision was not so limited. The majority opinion went on to hold that even if the law was "an act of nonpunitive legislative policymaking" applicable to only one individual, it was constitutionally permissible legislation. 433 U.S. at 477-482.

By the same token, Bank Markazi has no constitutional separation-of-powers claim based on the fact that Section 8772 applies only to its assets. Congress may enact laws that transfer possession and control of one person's private property.

CONCLUSION

For the foregoing reasons and those presented by the respondents, the judgment of the Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

December 22, 2015

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No. 14-770

IN THE

Supreme Court of the United States

BANK MARKAZI,
AKA THE CENTRAL BANK OF IRAN,
Petitioner,

v.

DEBORAH PETERSON, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES AND 225 INDIVIDUAL MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION	2
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. CONGRESS HAD AMPLE CONSTITUTIONAL AUTHORITY TO ENACT SECTION 8772	7
A. Section 8772 Derives From Numerous Constitutional Powers Entrusted To Congress	7
B. Section 8772 Furthers Multiple Weighty Legislative Interests	9
C. Congress Reasonably Circumscribed Section 8772 To Further Its Dual Aims	10
II. SECTION 8772 DOES NOT VIOLATE SEPARATION-OF-POWERS PRINCIPLES BY APPLYING ONLY TO ONE PENDING CASE	13
A. Congress Generally Has Discretion To Legislate As Broadly Or Narrowly As It Sees Fit	13
B. Legislative Particularity Is Not A Separation-Of-Powers Concern	15
C. Section 8772 Is Consistent With A Long History Of Particularized Legislation	16

TABLE OF CONTENTS—Continued

Page

D. The Court Will Invade Congress's Legislative Power If It Holds That Congress Cannot Legislate For One Case 22

III. SECTION 8772 DOES NOT VIOLATE SEPARATION-OF-POWERS PRINCIPLES BY "DICTATING" THE OUTCOME OF THIS CASE 26

A. Congress May Freely Change The Law Affecting Pending Cases Without Violating Separation-Of-Powers Principles 26

B. Bank Markazi's "Makeweight" Theory Promises Only To Undermine Legislative Power, Not To Protect Judicial Power 27

CONCLUSION 32

APPENDIX

APPENDIX A: List of *Amici Curiae* 1a

TABLE OF AUTHORITIES

CASES	Page(s)
Barenblatt v. United States, 360 U.S. 109 (1959)	30
Bruner v. United States, 343 U.S. 112 (1952)	26
Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014)	6
Carroll v. Greenwich Ins. Co., 199 U.S. 401 (1905)	14
City of New Orleans v. Dukes, 427 U.S. 297 (1976)	6
Cleland v. Nat'l Coll. of Bus., 435 U.S. 213 (1978)	14
Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000)	9, 10
Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C., 518 U.S. 727 (1996)	14
Eastland v. U.S. Servicemen's Fund, 421 U.S. 491 (1975)	30
Ecology Ctr. v. Castaneda, 426 F.3d 1144 (9th Cir. 2005)	30
Foretich v. United States, 351 F.3d 1198 (D.C. Cir. 2003)	20
Golan v. Holder, 132 S. Ct. 873 (2012)	17
Harris v. McRae, 448 U.S. 297 (1980)	15

TABLE OF AUTHORITIES—Continued

Page(s)

I.N.S. v. Chadha,
462 U.S. 919 (1983) 6, 22

In re Asbestos Prods. Liab. Litig.,
MDL No. 875 (E.D. Pa.) 24

In re Islamic Republic of Iran Terrorism Litig.,
659 F. Supp. 2d 31 (D.D.C. 2009) 3

In re Joint E. & S. Dist. Asbestos Litig.,
982 F.2d 721 (2d Cir. 1992), *as modified on reh'g*, 993 F.2d 7 (2d Cir. 1993) 24

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MDL No. 2179 (E.D. La.) 24

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MDL No. 2672 (N.D. Cal.) 24

Katzenbach v. Morgan,
384 U.S. 641 (1966) 14

Massachusetts v. E.P.A.,
549 U.S. 497 (2007) 14

McGrain v. Daugherty,
273 U.S. 135 (1927) 30

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835 F.2d 368 (1st Cir. 1987), *cert. denied*, 486 U.S. 1042 (1988) 20

TABLE OF AUTHORITIES—Continued

Page(s)

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530 U.S. 327 (2000) 6, 16, 22, 26

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301 U.S. 1 (1937) 14

Nat'l Coal. to Save Our Mall v. Norton,
269 F.3d 1092 (D.C. Cir. 2001) 16, 18

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012) 32

Nixon v. Adm'r of Gen. Servs.,
433 U.S. 425 (1977) 16, 18, 21, 22, 25

Paramino Lumber Co. v. Marshall,
309 U.S. 370 (1940) 17, 21

Paulson v. City of San Diego,
475 F.3d 1047 (9th Cir. 2007) 20

Pennsylvania v. Wheeling & Belmont Bridge Co.,
59 U.S. (18 How.) 421 (1856) 5, 16, 18

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995) ..... *passim*

Pope v. United States,
323 U.S. 1 (1944) 31

Regan v. Wald,
468 U.S. 222 (1984) 7

Robertson v. Seattle Audubon Soc'y,
503 U.S. 429 (1992) 5, 26, 27, 31

TABLE OF AUTHORITIES—Continued

Page(s)

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333 F.3d 228, 239 (D.C. Cir. 2003), *cert. denied*, 524 U.S. 915 (2004) 19

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279 U.S. 337 (1929) 14

Rostker v. Goldberg,
453 U.S. 57 (1981) 6, 7

Ry. Labor Execs.' Ass'n v. Gibbons,
455 U.S. 457 (1982) 19, 20

Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.,
468 U.S. 841 (1984) 22

Semler v. Or. State Bd. of Dental Exam'rs,
294 U.S. 608 (1935) 14

Thomas v. Network Solutions, Inc.,
176 F.3d 500 (D.C. Cir. 1999) 18

United States v. Brown,
381 U.S. 437 (1965) 21

United States v. Carolene Prods. Co.,
304 U.S. 144 (1938) 14, 28

United States v. Georgia,
No. 1:10-cv-00249 (N.D. Ga.) 25

United States v. Harris,
106 U.S. 629 (1883) 7

United States v. Klein,
80 U.S. (13 Wall.) 128 (1872) 5, 24, 26, 27

United States v. Lopez,
514 U.S. 549 (1995) 30, 31

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Maricopa Cnty., Ariz., No. 2:12-cv-00981 (D. Ariz.) 25

United States v. Mitchell, 463 U.S. 206 (1983) 17

United States v. Morrison, 529 U.S. 598 (2000) 7, 30, 31

United States v. Rodgers, 466 U.S. 475 (1984) 14, 16

United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801) 26

Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480 (1983) 7, 8

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Yakus v. United States, 321 U.S. 414 (1944) 30

CONSTITUTION

U.S. Const. art. I 1, 2

U.S. Const. art. I, § 1 7

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TABLE OF AUTHORITIES—Continued

Page(s)

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U.S. Const. art. I, § 8, cl. 18 8

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U.S. Const. amend. V 15

U.S. Const. amend. X 21

STATUTES

28 U.S.C. § 1407 25

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28 U.S.C. § 1605A(a) 8

28 U.S.C. § 1605A(c) 8

28 U.S.C. § 1605A(g) 8

28 U.S.C. § 1609 8

28 U.S.C. § 1610 8

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22 U.S.C. § 8772(a)(2) 4, 9, 12

TABLE OF AUTHORITIES—Continued

Page(s)

22 U.S.C. § 8772(a)(2)(A) 4, 9, 12

22 U.S.C. § 8772(a)(2)(B) 4, 12

22 U.S.C. § 8772(b) 10, 23

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§ 201, 116 Stat. 2337 8

§ 201(a), 116 Stat. 2337 3

TABLE OF AUTHORITIES—Continued

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Howard M. Wasserman, *The Irrepressible Myth of* Klein, 79 U. CIN. L. REV. 53 (2010) 27

INTEREST OF *AMICI CURIAE*[1]

Amicus curiae the Bipartisan Legal Advisory Group of the U.S. House of Representatives – consisting of the Honorable Paul D. Ryan, Speaker; the Honorable Kevin McCarthy, Majority Leader; the Honorable Steve Scalise, Majority Whip; the Honorable Nancy Pelosi, Democratic Leader; and the Honorable Steny H. Hoyer, Democratic Whip – "speaks for, and articulates the institutional position of, the House in all litigation matters." Rule II.8(b), Rules of the House of Representatives, 114th Cong. (2015), *available at* http://clerk.house.gov/legislative/house-rules.pdf. The other *amici* are 225 individual Members of the House who collectively represent approximately 160 million Americans.[2]

This case – which challenges the constitutionality of section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012 ("Iran Threat Reduction Act"), Pub. L. No. 112-158, 126 Stat. 1214, 1258-60 (2012), codified at 22 U.S.C. § 8772 ("Section 8772") – concerns Congress's broad powers under Article I of the Constitution to legislate in the field of foreign sovereign immunity. The case also concerns Congress's constitutional prerogative to write laws as broadly or narrowly as it deems prudent, and its long-recognized power to enact changes in the law no

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of the Court.

[2] A complete list of the individual Member *amici* appears in an appendix to this brief. App. A, *infra*, at 1a-10a.

matter the effects on matters pending at the time before the courts.

The House, and the individual *amici* as Article I constitutional officers, have a substantial institutional interest in the constitutionality of laws passed by the House. *Amici*'s interest is particularly substantial here because the House passed Section 8772 by a nearly unanimous – and overwhelmingly bipartisan – vote of 421-to-6. *See* 158 Cong. Rec. H5597-98 (Aug. 1, 2012). That unity of purpose should surprise no one. The House passed Section 8772 to help victims of Iran-sponsored terrorism obtain compensation long owed to them – and, in the process, to prevent Iran from using particular funds to bankroll a nuclear weapons program and future acts of terrorism.

Amici join Respondents in urging the Court to affirm the decision of the Second Circuit.

INTRODUCTION

Respondents are scores of Americans who have been victimized by acts of terrorism sponsored – as the federal courts repeatedly have determined – by Iran, including the 1983 Beirut Marine Barracks Bombing and the 1996 bombing of the Khobar Towers in Saudi Arabia. Long ago, Respondents secured money judgments against Iran to compensate them for their injuries and losses. However, Respondents have been stymied at almost every turn in their efforts to collect what indisputably is owed them. Pet. App. 52a-55a. Among those who have not died while awaiting justice, many are now elderly, and many face dire financial straits. *Id.* at 28a-29a. Petitioner is Bank Markazi, the Central Bank of Iran.

In 2008, Respondents learned that Bank Markazi – through a web of intermediaries – had an interest in certain assets worth billions of dollars held in a Citibank account in New York. *Id.* at 56a-57a. Respondents promptly obtained judicial restraints on those assets and, in 2010, brought this action against Bank Markazi and others seeking turnover of the assets. *Id.* at 62a-63a. Over the next two years, Bank Markazi fought "vigorously" to withhold the assets from Respondents, invoking state, federal, constitutional, and international law in its effort to do so. *Id.* at 54a-55a. Respondents' struggles to have their judgments paid were, by this time, tragically unsurprising. *See, e.g.*, *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 49-58, 62 (D.D.C. 2009) (observing numerous practical and legal obstacles plaintiffs historically have faced trying to enforce terrorism-related judgments against Iran).

In February 2012, the President issued an Executive Order that "blocked" all of Bank Markazi's assets in the United States – including the assets at issue in this case (hereinafter, "Blocked Assets"). Exec. Order 13,599, 77 Fed. Reg. 6659, 6659 (Feb. 5, 2012).[3] This order enabled Respondents to pursue the Blocked Assets under existing federal law that authorized turnover of "the blocked assets of any agency or instrumentality of [a] terrorist party." Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, § 201(a), 116 Stat. 2322, 2337 (2002) (codified at 28 U.S.C. § 1610 note). Despite Bank Markazi's prior admissions that it alone beneficially owned the

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[3] Congress authorized the President, in response to national emergencies, to "block" particular foreign assets within the United States, thereby effectively barring any transactions involving those assets. *See, e.g.*, 50 U.S.C. §§ 1701(a), 1702(a)(1)(B).

Blocked Assets, Pet. App. 97a-98a, it continued to fight turnover by quibbling "that the Blocked Assets are not assets 'of' Bank Markazi," *id.* at 96a.

Contemporaneously with the President's Executive Order, Congress considered legislation to make it easier for those with terrorism-related judgments against Iran to pursue Bank Markazi's assets to enforce those judgments. *See, e.g.*, H.R. 4070, 112th Cong. (2d Sess. 2012). These efforts culminated in the passage of Section 8772, which amends existing federal law and preempts inconsistent state laws that might otherwise be invoked to frustrate Respondents' efforts to attach the Blocked Assets. 22 U.S.C. § 8772(a)(1). When it permits turnover, Section 8772 further operates as an economic sanction to deter Iran from pursuing nuclear weapons and sponsoring additional acts of terrorism. *Id.* § 8772(a)(2). Critically however, Section 8772 does not permit turnover of the Blocked Assets unless a court first determines that no person "other than Iran" has an equitable or beneficial interest in those assets. *Id.* § 8772(a)(2)(A)-(B).

In 2013, the district court made the determinations required by Section 8772 and ordered turnover of the Blocked Assets pursuant to both that law and pre-Section 8772 law. Pet. App. 13a-30a. The Second Circuit affirmed. *Id.* at 2a. Both courts rejected Bank Markazi's argument, renewed here, that Section 8772 violates separation-of-powers principles by "effectively dictating" the outcome of this case. *Id.* at 7a-11a, 114a-15a.

SUMMARY OF ARGUMENT

This case will not decide whether Iran owes Respondents compensation for the losses they have suffered as a result of state-sponsored terrorism. Iran's liability for those losses was determined years ago and is undisputed here. Nor will this case decide whether Respondents generally can enforce their judgments against Iran. Congress long ago empowered Respondents to do so.

Instead, this case will decide whether Congress, in enacting Section 8772, properly changed existing law while this case was pending to make it easier for Respondents to pursue assets indisputably linked to Iran. Over a century of precedent confirms Congress's power to do exactly that. *See generally Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856).

Congress has sweeping power to enact laws concerning the sovereign immunity of foreign states, and Section 8772 is such a law. Bank Markazi nonetheless contends that Congress encroached upon the judicial power by enacting Section 8772. But Bank Markazi's contention turns on two distinct – yet equally flawed – premises: *first*, that Congress cannot amend the law to affect a single pending case; and *second*, that Congress cannot amend the law affecting a pending case if the law's factual underpinnings are well-known before the law takes effect. Congress has broad authority to write laws as generalized or particularized as it deems necessary, and Congress properly exercised that authority here. Congress also does not offend separation-of-powers principles by enacting

laws, including Section 8772, on the basis of facts that are known to it.

In arguing to the contrary, Bank Markazi proposes unprecedented limits on Congress's legislative powers. Worse still, it proposes limits that are formless – dependent on multiple "vague distinctions" that would provide Congress no clear guidance when it legislates. *Plaut*, 514 U.S. at 239. Bank Markazi does not offer these vague distinctions to protect the constitutional wall separating Congress and the judiciary, but instead to weaken the ground beneath that wall so as to evade a law it dislikes. Accordingly, the Court should reject Bank Markazi's invitation to "encroach[] on the central prerogatives of [Congress]." *Miller v. French*, 530 U.S. 327, 341 (2000).

ARGUMENT

Bank Markazi bears a very heavy burden asking the Court to invalidate Section 8772. "[J]udg[ing] the constitutionality of an Act of Congress" is "the gravest and most delicate duty that this Court is called upon to perform." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (quotation marks omitted); *see also I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983) ("When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it."). The Court, after all, does "not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *see, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) ("The wisdom of Congress's judgment on this matter is not our concern.").

This "[d]ue respect for the decisions of a coordinate branch of Government demands that [the Court] invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607 (2000); *see also United States v. Harris*, 106 U.S. 629, 635 (1883) ("lack of constitutional authority to pass an act in question [must be] clearly demonstrated"). Even greater deference is owed on matters over which the political branches have sweeping constitutional authority, *see Rostker*, 453 U.S. at 65, such as foreign sovereign immunity, *see Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983); *Regan v. Wald*, 468 U.S. 222, 242 (1984) (recognizing Court's "classical deference to the political branches in matters of foreign policy").

Here, Bank Markazi fails to show that "Congress has exceeded its constitutional bounds" in passing Section 8772, let alone make "a *plain* showing" that Congress has done so. *Morrison*, 529 U.S. at 607 (emphasis added).

I. CONGRESS HAD AMPLE CONSTITUTIONAL AUTHORITY TO ENACT SECTION 8772.

A. Section 8772 Derives From Numerous Constitutional Powers Entrusted To Congress.

The Constitution gives Congress alone the power to legislate. U.S. Const. art. I, § 1. The Constitution further empowers only Congress "to prescribe the jurisdiction of Federal courts, Art. I, § 8, cl. 9; to define offenses against the 'Law of Nations,' Art. I, § 8, cl. 10; to regulate commerce with foreign nations, Art. I, § 8, cl. 3; and to make all laws necessary and proper to

execute the Government's powers, Art. I, § 8, cl. 18." *Verlinden*, 461 U.S. at 493 n.19.

For nearly 40 years, Congress properly has wielded these express constitutional powers to regulate the sovereign immunity of foreign states. In 1976, Congress first codified this country's foreign sovereign immunity principles. *See generally* Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1441(d), 1602 *et seq.*). Congress subsequently enacted laws that lifted the sovereign immunity of foreign states that sponsor or support terrorism, and created private rights of action against such states. *See, e.g.*, Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, § 221(a), 110 Stat. 1214, 1241-43 (1996) (codified at 28 U.S.C. § 1605); National Defense Authorization Act for Fiscal Year 2008 ("NDAA FY08"), Pub. L. No. 110-181, § 1083 (a)(1), (b)(1)(A)(iii), 122 Stat. 3, 338-41 (2008) (codified at 28 U.S.C. § 1605A(a), (c)). Congress also enacted laws promoting the enforcement of judgments against state sponsors of terrorism by enabling holders of terrorism-related judgments to attach and execute against the property of offending states, their agencies, and their instrumentalities. *See, e.g.*, 28 U.S.C. §§ 1609-11; TRIA § 201, 116 Stat. at 2337 (codified at 28 U.S.C. § 1610); NDAA FY08 § 1083(a)(1), 122 Stat. at 340 (codified at 28 U.S.C. § 1605A(g)).

Following decades of legislation in the field of foreign sovereign immunity and, again, pursuant to its express constitutional authority, Congress in 2012 overwhelmingly passed Section 8772. *See* 158 Cong. Rec. H5597-98 (Aug. 1, 2012) (vote of 421-to-6); 158 Cong. Rec. S5859 (Aug. 1, 2012) (voice vote). As

explained above, Section 8772 allows Respondents – holders of terrorism-related judgments already obtained against Iran – to seek turnover of certain assets that (i) Iran alone equitably or beneficially owns, 22 U.S.C. § 8772(a)(2)(A), and (ii) the President already had "blocked" pursuant to Executive Order when Section 8772 became law, *id.* § 8772(a)(1)(B).

B. Section 8772 Furthers Multiple Weighty Legislative Interests.

Congress designed Section 8772 to advance two important but distinct legislative interests.

First, Congress intended Section 8772 to promote private rights of action for terrorism-related claims – fashioned by Congress over a decade earlier – by making it easier for certain plaintiffs with judgments in hand to recover the compensation already owed to them under existing federal law. 22 U.S.C. § 8772(a)(1); *see also id.* § 8772(a)(2) (statute meant "to ensure that Iran is held accountable for paying [terrorism-related] judgments"). To do this, Section 8772 expressly removes potential state-law roadblocks to attaching and executing against assets equitably or beneficially owned by Iran's central bank. *See id.* § 8772(a)(1). Congress, of course, "has the power to preempt state law," *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000), including state laws of attachment and execution in federal cases, *see* Fed. R. Civ. P 69(a)(1); 28 U.S.C. §§ 2071(a), 2072(b). Section 8772 also expressly lifts any immunity that, under prior law, Bank Markazi might have enjoyed from attachment or execution against its assets to satisfy judgments against Iran. 22 U.S.C. § 8772(a)(1)(C), (d)(3); *see also* Pet'r Br. 27-28.

Second, by making it more likely that Iran might be permanently dispossessed of billions of dollars in assets to satisfy its judgment debts to Respondents, Congress intended Section 8772 to pressure Iran economically and thereby deter its "efforts to acquire a nuclear weapons capability" and to perpetrate "other threatening activities." Iran Threat Reduction Act § 101; *accord* Pet. App. 21a, 29a; *see also id.* at 119a ("There can be no serious dispute that § 8772 furthers the United States' legitimate interest in furthering its foreign policy with respect to Iran."). In this respect, Section 8772 is just one part of the comprehensive scheme of economic sanctions embodied by the Iran Threat Reduction Act, and is directly in line with the "complex" history of congressionally-enacted sanctions against that "rogue state." Dianne E. Rennack, Cong. Research Serv., R43311, *Iran: U.S. Economic Sanctions and the Authority to Lift Sanctions*, at 1 (July 15, 2015); *see generally Kenneth Katzman*, Cong. Research Serv., RS20871, *Iran Sanctions* (Nov. 3, 2015). Congress, of course, has the power to levy economic sanctions against a foreign state. *See Crosby*, 530 U.S. at 373-74, 380-81.

C. Congress Reasonably Circumscribed Section 8772 To Further Its Dual Aims.

Congress could have written Section 8772 to apply to all of Iran's blocked assets. It chose not to. Instead, Section 8772 covers only those blocked assets "identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." 22 U.S.C. § 8772(b). Although Section 8772 nominally applies to a single pending judicial proceeding, the law actually sweeps broadly with respect to unpaid terrorism-

related judgments against Iran, as well as to Iran's blocked assets.

1. The *Peterson* proceeding alone implicates a broad class of judgments benefiting over 1,300 victims of terrorist attacks sponsored by the government of Iran, or the surviving family members and representatives of these victims. *See* Pet. App. 52a-53a & n.1; *see also id.* at 130a-44a (listing judgment creditors). These judgments were entered in nearly 20 independent judicial proceedings, and represented a large segment of all the unpaid terrorism-related judgments against Iran at that time. Further, additional judgment holders could have joined, and did join, the *Peterson* proceeding after Section 8772 became law. *See id.* at 18a-19a; Resp't Br. 47

The *Peterson* proceeding also implicates roughly $1.75 billion in Iran's blocked assets, which Section 8772 potentially makes available to satisfy those judgments (at least in part). *See id.* at 31a, 53a-54a. When Section 8772 became law, the Blocked Assets represented over 90 percent of all the Iran-linked funds that had been blocked by Executive Order. *See* Office of Foreign Asset Control, U.S. Dep't of the Treasury, Terrorist Assets Report, Calendar Year 2012, at 12, Table 1 ($1.936 billion in blocked funds), *available at* https://www.treasury.gov/resour ce-center/sanctions/Programs/Documents/tar2012.pdf.[4]

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[4] This figure has changed little since 2012. *See* Office of Foreign Asset Control, U.S. Dep't of the Treasury, Terrorist Assets Report, Calendar Year 2014, at 14, Table 1 ($1.974 billion in blocked funds), *available at* https://www.treasury.gov/ resource-center/sanctions/Programs/Documents/tar2014.pdf.

2. While Section 8772 sweeps broadly as to the totality of unpaid terrorism-related judgments against Iran, and as to Iran's blocked assets, Congress deliberately cabined the statute to ensure that Iran – and *only* Iran – would be "sanction[ed]" if and when a court ordered turnover of the Blocked Assets. 22 U.S.C. § 8772(a)(2). To this end, the statute authorizes attachment or execution only if a court finds, *inter alia*, that the Blocked Assets effectively belong to Iran alone, *id.* § 8772(a)(2)(A), and further that no one else "holds a constitutionally protected interest in th[ose] assets," *id.* § 8772(a)(2)(B). At the time Section 8772 became law, it was unsettled whether any "person other than Iran" might have a constitutionally protected interest in the assets. *See* Pet. App. 109a, 111a-12a & n.17, 115a-19a.

3. The district court carefully performed its judicial function under Section 8772, considering the voluminous record before it and making the determinations required by the statute. *See id.* at 119a ("In connection with making these determinations, the Court has allowed many submissions; the many felled trees required for this Court to plow through are evidence of that process."). The district court found that Section 8772's requirements were met, including that no one else "has a constitutional, beneficial or equitable interest in the Blocked Assets." *Id.* at 109a; *see also id.* at 111a, 113a. And, while the district court recognized that Section 8772 streamlined the turnover analysis, *see, e.g.*, *id.* at 73a, 97a, 103a, 112a, 118a, 121a, the district court still found turnover independently appropriate under pre-Section 8772 law, *see id.* at 4a, 97a, 100a, 118a.

II. SECTION 8772 DOES NOT VIOLATE SEPARATION-OF-POWERS PRINCIPLES BY APPLYING ONLY TO ONE PENDING CASE.

Bank Markazi does not contend that Congress cannot pass laws, like Section 8772, that make it easier for judgment holders to attach assets linked to foreign states to satisfy unpaid judgments against those foreign states. Bank Markazi instead argues that Congress wrongly usurped judicial power because Section 8772 changes the law only for a single pending case – in essence, that Congress went *too far* because Section 8772 does not go *far enough*. *See* Pet'r Br. 22.

But accepting Bank Markazi's "one case" principle would impose grossly artificial limits on Congress's constitutional prerogative to write laws as broadly or narrowly as Congress deems necessary, and it is inconsistent with the long history of congressional enactments that target discrete and emergent problems. Worse still, this "one case" principle would do violence to Congress's legislative powers while doing *nothing* to protect judicial power against legislative encroachment. Bank Markazi's cramped view of Congress's legislative authority promises only to muddy the line between legislative and judicial power, and frustrate the constitutional system carefully wrought by the Framers.

A. Congress Generally Has Discretion To Legislate As Broadly Or Narrowly As It Sees Fit.

"While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action." *Plaut*, 514 U.S. at 239 n.9. Time and again, this Court has recognized Congress's

authority to approach "reform one step at a time, addressing the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955). Congress simply "need not deal with every problem at once and must have a degree of leeway in tailoring means to ends." *Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 757 (1996) (citation omitted).[5]

Congress, of course, cannot "tailor means to ends" in a manner contrary to the Constitution. This generally means Congress cannot draw legislative distinctions that (i) proceed irrationally or along suspect lines, *see*

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[5] *Accord United States v. Rodgers*, 466 U.S. 475, 484 (1984) ("Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress."); *Cleland v. Nat'l Coll. of Bus.*, 435 U.S. 213, 220 (1978) ("[T]he Constitution does not require Congress to detect and correct abuses in the administration of all related programs before acting to combat those experienced in one."); *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966) ("[A] legislature need not 'strike at all evils at the same time.'" (quoting *Semler v. Or. State Bd. of Dental Exam'rs*, 294 U.S. 608, 610 (1935))); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 151 (1938) ("A Legislature may hit at an abuse which it has found, even though it has failed to strike at another."); *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937) ("The Constitution does not forbid 'cautious advance, step by step,' in dealing with the evils which are exhibited in activities within the range of legislative power." (quoting *Carroll v. Greenwich Ins. Co.*, 199 U.S. 401, 411 (1905))); *Roschen v. Ward*, 279 U.S. 337, 339 (1929) ("A statute is not invalid under the Constitution because it might have gone farther than it did ."); *cf. Massachusetts v. E.P.A.*, 549 U.S. 497, 524 (2007) (recognizing that "legislatures do not generally resolve massive problems in one fell . . swoop" but "instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed").

Harris v. McRae, 448 U.S. 297, 326 (1980); (ii) unduly infringe fundamental rights and liberty interests, *see Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997); (iii) deprive those regulated of due process, U.S. Const. amend. V; or (iv) operate as a bill of attainder, *id.* art. I, § 9, cl. 3. Bank Markazi does not contend that Section 8772 violates any of these constitutional limits on Congress's power.

B. Legislative Particularity Is Not A Separation-Of-Powers Concern.

Bank Markazi foregoes conventional attacks on Congress's power and instead tries to squeeze out of the separation-of-powers doctrine – "a *structural safeguard*" – "a remedy" for the "specific harm" it claims to have suffered because of Section 8772's narrowness. *Plaut*, 514 U.S. at 239. This proves too much. Legislative particularity alone is no constitutional vice, and it certainly presents no separation-of-powers problem.

An act of Congress does not violate separation-of-powers principles merely because it operates "in a manner – viz., with particular rather than general effect – that is unusual for a legislature." *Id.* at 228. This is so because "*power* is the object of the separation-of-powers prohibition" – "[n]ot favoritism, nor even corruption." *Id.* "The prohibition is violated" all the same if legislation usurps judicial power only once or "40 times." *Id.* Thus, while "general statute[s] may reduce the *perception* that [a law] was prompted by individual favoritism," *id.* (emphasis added), "[i]t makes no difference whatever to [a] separation-of-powers violation that [the offending law] is in gross rather than particularized," *id.* at 239.

Consequently, "laws that impose a duty or liability upon a single individual or firm are not on that account invalid." *Id.* at 239 n.9. Neither are laws that "refer[] to [one person] by name." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 472 (1977). Rather, Congress rightly "may legislate 'a legitimate class of one.'" *Plaut*, 514 U.S. at 239 n.9 (quoting *Nixon*, 433 U.S. at 472). And Congress's legislative authority does not shrink just because litigation has commenced. *See Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001) ("In view of *Plaut*, *Miller v. French* and *Wheeling Bridge*, we see no reason why the specificity should suddenly become fatal merely because there happened to be a pending lawsuit.").

C. Section 8772 Is Consistent With A Long History Of Particularized Legislation.

Bank Markazi tries to evade these sound constitutional principles by claiming that Section 8772's narrowness is "virtually unprecedented," and arguing that the law must be unconstitutional on that account. Pet'r Br. 18.[6] This notion defies Section 8772's presumption of constitutionality, *see supra* 6-7, and ignores the Court's enduring deference to Congress to "[r]esol[ve] the pros and cons of whether a statute should sweep broadly or narrowly," *Rodgers*, 466 U.S.

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[6] *See also, e.g.*, Pet'r Br. 17 ("an unprecedented incursion on the judicial power"); *id.* at 18 ("extreme"); *id.* at 21 ("unprecedented in our Nation's history"); *id.* at 22 ("a structural failure of unprecedented proportions," "a radical departure from this Nation's traditions," and "virtually unheard of in the history of the Republic"); *id.* at 33 ("an extreme departure from the separation of powers"); *id.* at 35 ("an unprecedented legislative exercise of judicial power").

at 484; *see also supra* 13-15 & n.5. More fundamentally, however, Section 8772 is not an historical anomaly.

1. Since the founding of the Republic, Congress has enacted private bills – laws made applicable only to "one or several specified persons, corporations, [or] institutions" – "to address unique problems that public law either created or overlooked." Christopher M. Davis, Cong. Research Serv., RS22450, *Procedural Analysis of Private Laws Enacted: 1986-2013*, at 1 (Apr. 9, 2013) (quotation marks omitted); *see also* Matthew Mantel, *Private Bills and Private Laws*, 99 LAW LIBR. J. 87, 88 (2007).

These bills often granted to named individuals unusual relief from a wide range of generally applicable laws – including laws that affected rights between private parties – as well as legal doctrines – including sovereign immunity – that bar private parties from pursuing claims for money damages. *See Golan v. Holder*, 132 S. Ct. 873, 885-87 (2012) (copyrights and patents); *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (federal sovereign immunity). Critically, private bills never have been deemed to violate separation-of-powers principles simply because those laws hew narrowly. *See Paramino Lumber Co. v. Marshall*, 309 U.S. 370, 380 (1940); *Private Bills in Congress*, 79 HARV. L. REV. 1684, 1688 (1966) ("[I]t would be difficult to conclude that – merely because specific cases are dealt with – private legislation is 'inherently judicial.'").

Consistent with this history, Section 8772 grants Respondents unusual relief from the laws of attachment and execution generally applicable in federal cases. Also consistent with this history, Section 8772 makes it easier for Respondents to overcome Bank Markazi's assertion of sovereign immunity – over

which the political branches have plenary control, *see supra* 7-9 – in order to enforce judgments on claims for money damages.

2. In addition to private bills, Congress repeatedly has passed public laws targeting discrete legislative objects. Such laws include, among others:

(i) the act declaring the legal status of two bridges at the center of pending litigation in *Wheeling Bridge*, 59 U.S. at 429;

(ii) the act directing the Administrator of General Services to take custody of President Nixon's papers and tapes, *Nixon*, 433 U.S. at 429 (upholding Pub. L. No. 93-526, §§ 101-06, 88 Stat. 1695, 1695-98 (1974));

(iii) the act retroactively legalizing fees collected by a single private firm over a set period of time, which act referred by docket number to a single pending suit challenging those fees, *see Thomas v. Network Solutions, Inc.*, 176 F.3d 500, 505-06 & n.9 (D.C. Cir. 1999) (upholding Pub. L. No. 105-174, § 8003, 112 Stat. 58, 93 (1998));

(iv) the act waiving potential statutory hurdles to the construction of a single national monument during the pendency of litigation over its construction, *see Nat'l Coal. to Save Our Mall*, 269 F.3d at 1096-97 (rejecting similar separation-of-powers challenge to Pub. L. No. 107-11, § 3, 115 Stat. 19, 19 (2001)); and

(v) the act that lifted, in a single pending case identified by docket number, Iran's claimed immunity from suit over the 1979 Iran hostage crisis, *see* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-77, § 626(c), 115 Stat. 748, 803 (2001), *as amended by* Pub. L. No. 107-117, Div. B., § 208, 115 Stat. 2230, 2299 (2002), *invalidated on non-separation-of-powers grounds by Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 237 & n.5, 239 (D.C. Cir. 2003), *cert. denied*, 524 U.S. 915 (2004).[7]

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[7] These tailored public laws also include the Rock Island Railroad Transition and Employee Assistance Act ("RITA"), Pub. L. No. 96-254, 94 Stat. 399 (1980), which required the trustee for a defunct railroad's pending bankruptcy proceeding "to provide economic benefits from the estate's assets" to certain unemployed former railroad employees, *Ry. Labor Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 461-63 (1982) (citing RITA §§ 106, 110). This Court characterized RITA as "nothing more than a private bill" "on a rather grand scale," inasmuch as it "applie[d] to only one regional bankrupt railroad," its "employee protection provisions cover[ed] a particular problem of one bankrupt railroad," and it thus was "a response to the problems caused by the bankruptcy of *one* railroad." *Id.* at 470-71. While the Court ultimately invalidated RITA under the Bankruptcy Clause's "uniformity" requirement, *id.* – not on separation-of-powers principles, *see id.* at 465 n.9 – several members of the Court expressed skepticism at oral argument that the law would fall on separation-of-powers grounds, *see* Oral Arg. at 1:14 to 1:16, *Ry. Labor Execs.' Ass'n v. Gibbons*, No. 80-415, 455 U.S. 457 (1982), *available at* https://www.oyez.org/cases/1981/80-415. Moreover, the Court recognized that "uniformity in the applicability of legislation is not required by the Commerce Clause." *Gibbons*, 455 U.S. at 468. Section 8772, of course, derives substantially from Congress's plenary authority over foreign commerce. *See*

3. Bank Markazi tries to muddy this historical landscape by pointing to a handful of authorities that (i) broadly distinguish between judicial and legislative powers and generally decry "trial by legislature," *see* Pet'r Br. 23-25, 29-30; and (ii) reflect state courts' antipathy to "special legislation" during the 19th

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supra 7-9. And, unlike RITA, Section 8772 does not create any new liabilities. *See supra* 4, 9-10.

See also, e.g., Act to Preserve the Mt. Soledad Veterans Memorial in San Diego, California , Pub. L. No. 109-272, 120 Stat. 770 (2006) (transferring ownership of monument to United States during pendency of litigation to enforce injunction against City of San Diego prohibiting city's ownership of monument), *discussed in Paulson v. City of San Diego*, 475 F.3d 1047, 1048 (9th Cir. 2007) (holding that act rendered case moot); Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, §§ 1, 4, 119 Stat. 15, 15 (2005) (granting single federal district court jurisdiction to adjudicate federal or constitutional "suit or claim by or on behalf of Theresa Marie Schiavo" only if "filed within 30 days after the date of enactment of this Act"); Department of Transportation and Related Agencies Appropriations Act, 1997, Pub. L. No. 104-205, § 350, 110 Stat. 2951, 2979 (1996) (effectively prohibiting D.C. Superior Court, "in any pending case," from awarding one father custody of, or rights to visit, his minor child), *invalidated on other grounds*, *Foretich v. United States*, 351 F.3d 1198, 1226 (D.C. Cir. 2003); Joint Resolution to Provide for a Settlement to the Maine Central Railroad Company and Portland Terminal Company Labor-Management Dispute, Pub. L. No. 99-431, 100 Stat. 987 (1986) (effectively ending a single ongoing labor dispute "referred to in Executive Order Numbered 12557 of May 16, 1986"), *constitutionality upheld by Me. Cent. R.R. Co. v. Bhd. of Maint. of Way Emps.*, 835 F.2d 368, 372-73 (1st Cir. 1987) (rejecting separation-of-powers challenge because, in part, "Congress did not decide the dispute on the basis of pre-existing rules, interpreting and applying the law"), *cert. denied*, 486 U.S. 1042 (1988).

century, *see id.* 31-32. None of these authorities casts doubt on Congress's power to legislate as it has here.

Even if all "trials by legislature" involved a single case, the inverse proposition does not ineluctably follow: Not all laws affecting a single case amount to "trials by legislature." Moreover, while "[t]he constitutions of many of the states" independently "forbid private legislation," the federal Constitution "contains no provision against [such] acts enacted by the federal government except for a prohibition of bills of attainder and grants of nobility." *Paramino Lumber*, 309 U.S. at 380; *cf.* U.S. Const. amend. X; *see generally* Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39, 40 (2013-14); Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 721 n.6 (2012) (listing 46 states' constitutional prohibitions on "special" legislation).

Bank Markazi rightly does not argue that Section 8772 is a bill of attainder, *see* Pet. App. 115a-16a, yet still points to the Bill of Attainder Clause as evincing "broader separation-of-powers concerns" implicit in the Constitution, Pet'r Br. 41-42. No matter whether the Clause may reflect such concerns, *see United States v. Brown*, 381 U.S. 437, 442-46 (1965), it is beside the point when assessing the constitutionality of a law based on its *breadth* rather than its *effect*. Not even the Bill of Attainder Clause "limit[s] Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all." *Nixon*, 433 U.S. at 471; *see also id.* at 471 n.33 ("[M]ere specificity of law does not call into play the Bill of Attainder Clause."). The Clause – and by extension separation-of-powers principles – cannot be wielded "as a variant

of the equal protection doctrine" to invalidate "Act[s] of Congress that legislatively burden[] some persons or groups but not all other plausible individuals." *Id.* at 471; *cf. Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 859 & n.17 (1984) (distinguishing between claims based on equal protection and bill of attainder theories). Simply put, Congress neither offends nor commandeers federal judicial power by passing underinclusive laws.

D. The Court Will Invade Congress's Legislative Power If It Holds That Congress Cannot Legislate For One Case.

The Constitution enumerates each of the three branches' "central prerogatives," but "the boundaries between the[m] are not 'hermetically' sealed." *Miller*, 530 U.S. at 341 (quoting *Chadha*, 462 U.S. at 951). To fulfill its essential purpose as a "structural safeguard," the separation-of-powers doctrine therefore demands "high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut*, 514 U.S. at 239. On the other hand, "the unnecessary building of such walls is, in itself, dangerous, because the Constitution blends, as well as separates, powers in its effort to create a government that will work for, as well as protect the liberties of, its citizens." *Id.* at 245 (Breyer, J., concurring).

Bank Markazi would build the wall between Congress and the judiciary to bar every law "governing a single pending *case*." Pet'r Br. 40. Bank Markazi believes this threshold will ensure that Congress cannot meddle with "[t]he core judicial function to decide particular cases or controversies." *Id.* But

stripped of its baseless assumption that all laws affecting a single case necessarily "decide" the case, Bank Markazi's "one case" principle proves hopelessly unworkable and even dangerous.

1. If the Constitution actually constrained the number of cases that Congress properly could affect by legislation, where exactly between "all cases" and "one case" would legislative power improperly transform into judicial power? Bank Markazi provides the Court no answers and no limiting principle. Congress should not have to guess where on a numerosity spectrum it properly may legislate without violating separation-of-powers principles. Indeed, this Court already has said as much. *See Plaut*, 514 U.S. at 239 ("It makes no difference whatever to [a] separation-of-powers violation that it is in gross rather than particularized ").

2. Far from being "high and clear," *id*, Bank Markazi's proposed "one case" principle is just the opposite. This dispute is a case in point.

Section 8772 applies to "one case" inasmuch as it does not affect Bank Markazi's assets beyond the "proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." 22 U.S.C. § 8772(b); *see also id.* § 8772(c)(2). But, as discussed above, the *Peterson* proceeding only nominally amounts to "one case." *See supra* 10-11. In reality, it comprises an umbrella litigation involving "eighteen groups of judgment creditors," who wound up before the district court "in different procedural postures." Pet. App. 52a-53a & n.1; *see also id.* at 2a n.1, 16a-17a. These groups' actions were "litigated in fits and starts" as separate matters until they were "collected together" and, ultimately, "proceeded before" a single district court judge. *Id.* at 54a;

see also id. at 13a-17a. Again, the underlying judgments at issue comprised a substantial portion of all the outstanding terrorism-related judgments against Iran, and the assets at issue comprised nearly all of Iran's blocked assets in the United States. *See supra* 10-12. Bank Markazi's simplistic characterization of this matter as "one case" therefore serves no purpose other than to enable Bank Markazi to bootstrap Section 8772 into a supposed violation of the Court's rulings in *Klein* and its progeny.

3. Indeed, Bank Markazi's "one case" principle, if accepted, could be used to invalidate targeted laws affecting any manner of pending mass or consolidated actions simply because those actions proceed under a single docket number.

For instance, under this "one case" principle, Congress could not pass any laws affecting a single pending class action, even in cases involving legions of class members and claims worth billions of dollars. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2547 (2011); *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 725, 728-32 (2d Cir. 1992), *as modified on reh'g*, 993 F.2d 7 (2d Cir. 1993). Nor could Congress pass any laws affecting a single pending multidistrict litigation, even in a proceeding that implicates matters of serious national importance. *See, e.g.*, *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, MDL No. 2672 (N.D. Cal.); *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, MDL No. 2179 (E.D. La.); *In re Asbestos Prods. Liab. Litig.*, MDL No. 875 (E.D. Pa.). Nor could Congress pass any laws affecting a single pending government enforcement action to combat allegedly widespread civil rights violations in a single major U.S. city or

state. *See, e.g.*, *United States v. Maricopa Cnty.*, No. 2:12-cv-00981 (D. Ariz.); *United States v. Georgia*, No. 1:10-cv-00249 (N.D. Ga.).

Congress has sanctioned the use of consolidation, joinder, and channeling mechanisms because they promote judicial economy. *See generally* Fed. R. Civ. P. 19, 23; 28 U.S.C. § 1407. Bank Markazi's "one case" principle, however, might discourage Congress from continuing to sanction the use of these mechanisms if their use arbitrarily prevents Congress from changing substantive law to respond to exigencies in a particular case.

Congress might have passed a different law had this case continued to proceed as a patchwork of miscellaneous actions under different docket numbers. The district court's pragmatic corralling of those actions made that approach unnecessary. Section 8772's constitutionality should not turn on the peculiar procedural complexities that led to the consolidation of Respondents' efforts to execute against the Blocked Assets.

* * *

The Constitution does not bar Congress from enacting a law that affects a single case simply *because* the law applies no more broadly. Bank Markazi's proposed "one case" principle would do nothing to gird the wall between judicial and legislative power, but instead would hamstring Congress from passing critical legislation – no matter the scale of the problem at hand, nor how urgent the need for a legislative fix – just because a law might be underinclusive. *See Nixon*, 433 U.S. at 470 (observing that it "would cripple the very process of legislating" if "any individual or group that is made the subject of adverse

legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality"). The Court should reject Bank Markazi's "low wall[]," built on "vague distinctions," and refrain from running roughshod over Congress's power to tailor means to ends. *Plaut*, 514 U.S. at 239.

III. SECTION 8772 DOES NOT VIOLATE SEPARATION-OF-POWERS PRINCIPLES BY "DICTATING" THE OUTCOME OF THIS CASE.

A. Congress May Freely Change The Law Affecting Pending Cases Without Violating Separation-Of-Powers Principles.

Sometimes Congress passes laws that inadvertently affect cases pending before the courts. Sometimes Congress passes laws that deliberately affect pending cases. No matter its intent, Congress does not violate separation-of-powers principles merely because its laws affect pending cases. *See Miller*, 530 U.S. at 349; *Plaut*, 514 U.S. at 218; *Robertson*, 503 U.S. at 441; *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). This is true even of laws that strip federal courts of jurisdiction over cases still proceeding before them. *See, e.g.*, *Bruner v. United States*, 343 U.S. 112, 116-17 & n.8 (1952).

What Congress may not do, this Court has said, is pass laws that either interfere with final judgments or compel courts in pending cases to reach particular outcomes under existing law. *See Plaut*, 514 U.S. at 225-26; *Robertson*, 503 U.S. at 438; *Klein*, 80 U.S. (13 Wall.) at 146. In *Plaut*, for instance, Congress purported retroactively to reopen final judgments. 514 U.S. at 225-26. And in *Klein*, Congress purported

to tell this Court to interpret existing law and facts "precisely contrary" to its own view. 80 U.S. at 147 In both instances, Congress encroached upon the courts' exclusive power "not merely to rule on cases, but to *decide* them." *Plaut*, 514 U.S. at 218-19.

Section 8772 neither interferes with a final judgment nor compels the courts to reach a particular outcome under existing law. Section 8772 became effective before the district court ordered turnover in this case. And, as Bank Markazi concedes, Section 8772 "modif[ies] substantive law – including state property law – for [this] case." Pet'r Br. 52; *see also* Pet. 10 ("[Section] 8772 fundamentally changes the governing law."). That should be the end of the matter. *See Robertson*, 503 U.S. at 441.

B. Bank Markazi's "Makeweight" Theory Promises Only To Undermine Legislative Power, Not To Protect Judicial Power.

Bank Markazi urges the Court to invalidate Section 8772 because it believes the law "*effectively* dictates the outcome of this one case." Pet'r Br. 19 (emphasis added); *see also id.* at 17, 42, 45. That would be an extraordinary and unprecedented ruling. This Court never has struck down a statute on separation-of-powers grounds because, in amending the law, Congress "effectively" changed the outcome of a pending case. Nor has Bank Markazi identified a single lower court decision that has invalidated a law on such grounds. Indeed, no such case exists. *See* Howard M. Wasserman, *The Irrepressible Myth of* Klein, 79 U. CIN. L. REV. 53, 55 (2010) ("[I]n almost 140 years, the only case to strike down a law explicitly on *Klein* grounds was *Klein* itself; every *Klein*-based challenge to federal legislation has, quite appropriately, failed.").

This aspect of Bank Markazi's argument hinges on its complaint that the judicial findings required by Section 8772 "were makeweights," inasmuch as the "findings [allegedly] were foregone conclusions" when Congress passed the law. Pet'r Br. 20; *see also id.* at 45-48; Pet. 15, 32. This "makeweight" theory reflects a profound disrespect for both Congress's and the courts' respective roles and, if accepted, would only degrade the wall separating those roles.

1. Under Bank Markazi's "makeweight" theory, legislative power could be deemed to usurp judicial power solely on the basis of factors beyond either Congress's or the courts' control – including a party's own statements in litigation. Again, this dispute is a case in point.

Bank Markazi complains that its ownership of the Blocked Assets was a "foregone conclusion" – and thus a separation-of-powers concern – in light of the repeated admissions about ownership it made below in fighting attachment under pre-Section 8772 law. *See* Pet'r Br. 47; Pet. App. 97a-98a & n.10, 113a. But, the Constitution did not require Congress "to ignore such evidence" when changing the law. *Carolene Prods.*, 304 U.S. at 149. Nor were Bank Markazi's interests in the Blocked Assets unrelated to Congress's aims in passing Section 8772. *See supra* 10-12. Although Bank Markazi's prior assertions made the district court's fact-finding task easier under Section 8772, *see supra* 9-10, 12, Section 8772 still required the court to undertake this fact-finding, which was far from perfunctory, *see* Pet. App. 119a. Insofar as Congress was aware, Bank Markazi might have repudiated its prior assertions after the law's enactment. Nothing in Section 8772 (nor any other law) prevented Bank Markazi from doing so. If Bank Markazi opted not to disavow its

prior assertions for fear of an adverse ruling under pre-Section 8772 law, that was *its* choice – not Congress's.

Thus, Bank Markazi essentially contends that Section 8772 usurps judicial power just because Bank Markazi happened to admit ownership of the Blocked Assets *before* Congress passed Section 8772. Pet'r Br. 47 Accepting this self-serving notion would do nothing more than empower litigants to manufacture separation-of-powers problems to subvert laws they dislike. For instance, even if Bank Markazi had not declared its beneficial interests in the Blocked Assets before Congress *introduced* Section 8772, Bank Markazi still could have made that fact a "foregone conclusion" – and thus rendered Section 8772 invalid under this theory – just by admitting its interests before Congress *enacted* Section 8772. Indeed, any party could contrive a separation-of-powers defect so long as the party admits the adversely dispositive facts before a bill becomes law. Such gamesmanship not only would defy over a century of clear precedent respecting Congress's power to amend laws affecting pending cases; it would exploit judicial processes as a tool to defeat Congress's legislative will.

2. Taken to its natural conclusion, Bank Markazi's "makeweight" theory could be used to invalidate any otherwise valid act of Congress whenever Congress requires courts to determine facts that are known to Congress when it changes the law. For instance, setting aside its admissions of beneficial ownership, Bank Markazi still could have used its "makeweight" theory to fight Section 8772 if, before Congress enacted the law, the district court already found that Bank Markazi beneficially owned the Blocked Assets. *But see, e.g.*, *Ecology Ctr. v. Castaneda*, 426 F.3d 1144,

1150 (9th Cir. 2005) (statute did not improperly compel district court to make factual finding just because district court already found requisite fact that Congress later wrote into amended law). Worse yet, Bank Markazi could have used its "makeweight" theory to challenge Section 8772 if Congress had investigated and determined *for itself* that Bank Markazi beneficially owned the Blocked Assets.

In this respect, Bank Markazi perversely suggests that legislative ignorance *promotes* separation-of-powers principles when, in fact, the opposite is true. While the Constitution "does not require that Congress find for itself every fact upon which it desires to base legislative action," *Yakus v. United States*, 321 U.S. 414, 424 (1944), "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change," *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927). Indeed, "[t]he power of inquiry has been employed by Congress throughout our history, over the whole range of national interests concerning which Congress might legislate or decide upon due investigation not to legislate." *Barenblatt v. United States*, 360 U.S. 109, 111 (1959); *see also Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975) ("[T]he scope of [Congress's] power of inquiry is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." (quotation marks omitted)). Yet, even when Congress makes factual determinations to substantiate its laws, courts are not bound to accept those determinations when applying the law. *See Morrison*, 529 U.S. at 614; *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995).

It does not "belittle the judicial role" for Congress to reach conclusions about a fact when enacting legislation but not compel the courts to accept its conclusions when applying the law. Pet'r Br. 46; *contra Morrison*, 529 U.S. at 614; *Lopez*, 514 U.S. at 557 n.2. Nor does litigation become "any the less a case or controversy upon which a court possessing the federal judicial power may rightly give judgment, because the plaintiff's claim is uncontested or incontestable." *Pope v. United States*, 323 U.S. 1, 11 (1944).

Bank Markazi theorizes that legislative power encroaches upon judicial power somewhere between congressional speculation and congressional certitude. As with its "one case" principle, however, *see supra* 22-26, Bank Markazi provides the Court no limiting principle for its "makeweight" theory – no "high wall[]," no "clear distinctions." *Plaut*, 514 U.S. at 239. Congress should not have to guess where on a factual-certainty spectrum it properly may legislate. Nor should Congress be discouraged from making informed legislative judgments for fear that knowing too much could render its laws invalid.

3. This Court already has said where the wall between legislative and judicial power properly lies: congressionally "*compelled* findings or results under old law." *Robertson*, 503 U.S. at 438 (emphasis added); *see also id.* (statute may not "direct any particular findings of fact or applications of law, old or new, to fact"). This standard is clear. It is easy to administer. It does not care about a law's *effects* on a pending case, what Congress *knows* when it legislates, or how badly Congress *wants* a court to make a particular statutory finding. *See* Pet'r Br. 45, 48. And, this standard acknowledges the self-evident fact that

Congress writes laws designed to achieve outcomes it prefers and to prevent outcomes it does not prefer. That is the whole point of legislating. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) ("[Policy] decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them.").

Whatever Section 8772's effect on the outcome of this case, whatever Congress's intent in crafting the law's requirements, Section 8772 falls squarely on the legislative side of the wall because it does not *compel* the courts to find anything, let alone under old law. The Constitution requires no more.

CONCLUSION

The judgment of the Second Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

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In the
Supreme Court of the United States

BANK MARKAZI,
THE CENTRAL BANK OF IRAN,
Petitioner,

v.

DEBORAH D. PETERSON, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF CONSTITUTIONAL LAW AND FEDERAL COURTS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. *United States v. Klein* is correctly understood to prohibit statutes that prescribe unconstitutional rules of decision 3

A. *Klein* held that Congress lacks authority to prescribe unconstitutional rules of decision 5

B. *Klein* need not be understood to adopt any broader principle concerning Congress's authority to prescribe rules of decision 10

C. The contrary understandings advanced by petitioner and its *amici* are flawed 18

II. There is no freestanding constitutional rule against legislating with respect to a single case 26

CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

Cases

Biodiversity Assocs. v. Cables,
357 F.3d 1152 (10th Cir. 2004).....16

Carpenter v. Wabash Ry. Co.,
309 U.S. 23 (1940).....19

Collins v. Youngblood,
497 U.S. 37 (1990).....27

Cruzan v. Director, Mo. Dep't of Health,
497 U.S. 261 (1990).....27, 32

Dames & Moore v. Regan,
453 U.S. 654 (1981).....33

Dickerson v. United States,
530 U.S. 428 (2000).....21

Fletcher v. Peck,
10 U.S. 87 (1810).....14

Gelpcke v. City of Dubuque,
68 U.S. 175 (1864).....17

INS v. Chadha,
462 U.S. 919 (1983).....29, 31

Landgraf v. USI Film Prods.,
511 U.S. 244 (1994).....27

Lopez v. Gonzales,
549 U.S. 47 (2006).....22

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5 U.S. 137 (1803).....10

McCulloch v. Maryland,
17 U.S. 316 (1819).....30

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491 U.S. 110 (1989).....22

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132 S. Ct. 2566 (2012).....22

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433 U.S. 425 (1977).....31

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309 U.S. 370 (1940).....26

Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421 (1856).....15, 16, 19

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995).....28, 31

Robertson v. Seattle Audubon Soc'y,
503 U.S. 429 (1992).....19, 23, 24

United States v. Brown,
381 U.S. 437 (1965).....30

United States v. Klein,
80 U.S. 128 (1872).....*passim*

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76 U.S. 531 (1870).....6

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5 U.S. 103 (1801).....19

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428 U.S. 1 (1976).....22

W. Union Tel. Co. v. Lenroot,
323 U.S. 490 (1945).....22

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343 U.S. 579 (1952).....32

Constitutional Provision

U.S. Const. art. I, § 8 29

Statutes

6 Stat. (1846) 28

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Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 Mercer L. Rev. 697 (1995) 22

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who teach and write in the fields of constitutional law and federal courts, and they have an interest in the sound development of the law in those fields.

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SUMMARY OF ARGUMENT

This Court's decision in *United States v. Klein*, 80 U.S. 128 (1872), has long puzzled scholars. It has been described as "confusing,"[2] "rais[ing] more questions than it answers,"[3] and even "sufficiently impenetrable that calling it opaque is a compliment."[4]

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[1] Pursuant to this Court's Rule 37.3(a), *amici* state that this brief has been filed with the written consent of all parties, which have filed blanket consents to *amicus curiae* briefs with the Clerk of Court. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States v. Klein *Revisited*, 1981 Wis. L. Rev. 1189, 1193.

[3] Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 323 (7th ed. 2015).

[4] Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 Geo. L.J. 1, 34 (2002).

As the late Professor Daniel J. Meltzer observed, "[m]uch that is said in the opinion is exaggerated if not dead wrong."[5]

Worse, the opinion in *Klein* is sufficiently delphic that some courts and scholars have developed "an uncritical devotion which resembles a cult of the *Klein* case," and which draws on the decision as a "source of principles protecting the judiciary from the other branches," often by stretching the opinion "extraordinarily beyond its facts."[6]

This case provides the Court with the happy opportunity to clarify *Klein* and strip the cult of some of its more dangerous tools. The Court should do so by confirming that—as scholars widely agree—*Klein* stands for the principle that Congress cannot prescribe an unconstitutional rule of decision. And the Court should disavow once and for all the broader interpretations of *Klein* advanced by petitioner and its *amici*.

The Court should also reject the alternative argument of petitioner and its *amici* that the Constitution prohibits Congress from legislating with respect to a single case. This supposed separation-of-powers principle cannot be squared with the Constitution's text, Congress's historical exercise of its legislative powers, or this Court's decisions. Like the many misunderstandings of *Klein* that have flourished over the past century and a half, this mistaken view of the separation of powers should also be laid to rest.

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[5] Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 Geo. L.J. 2537, 2549 (1998).

[6] Young, *supra*, at 1195.

ARGUMENT

I. *United States v. Klein* is correctly understood to prohibit statutes that prescribe unconstitutional rules of decision.

Any sound understanding of *Klein*'s precedential effect should satisfy two basic requirements. First, the principle that is purported to be the holding of the case should explain the result in *Klein* itself. Second, that principle should be consistent with the remainder of this Court's jurisprudence.

The reason for the first requirement is obvious: A principle that does not explain the result in *Klein* cannot be the holding, and thus cannot have *stare decisis* effect. The reason for the second requirement is equally clear: If a principle is at odds with wide swaths of this Court's decisions, then that principle is a dead letter, and it makes no difference whether *Klein* purported to hold it or not.

Adopting a theory of *Klein* that fails to satisfy both criteria would have disturbing consequences. If *Klein* were misunderstood to rest on a principle that did not explain the outcome, it would also be misunderstood to reflect a binding application of that principle to the statute that was before the Court in *Klein*. The result would be to expand the precedential force of the decision beyond its proper bounds—and ultimately to rule that statutes are unconstitutional under *Klein*, even when *Klein* itself would not have viewed those statutes as unconstitutional. It would similarly contradict bedrock values of *stare decisis* and the consistent development of the law to invoke *Klein*, nearly 150 years after it was decided, to rule that a statute is invalid based on a principle

that the Court has squarely repudiated in numerous other cases in the meantime.

It follows from this framework that *Klein* should be understood to hold that Congress cannot prescribe an unconstitutional rule of decision. Although the decision is enigmatic, scholars broadly agree that the decision *at least* held that Congress exceeds its authority when it attempts to decree a result that would violate a principle of constitutional law.[7] That

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[7] *See, e.g.*, Meltzer, *supra*, at 2549 ("[*Klein*] stand[s] for something general and important—that whatever the breadth of Congress's power to regulate federal court jurisdiction, it may not exercise that power in a way that requires a federal court to act unconstitutionally."); Erwin Chemerinsky, Federal Jurisdiction § 3.2, at 193 (6th ed. 2012) (describing the understanding of many scholars that *Klein* "establishes only that Congress may not restrict Supreme Court jurisdiction in a manner that violates other constitutional provisions"); Fallon et al., *supra*, at 298 ("[*Klein*] may be best read as resting on distinctive substantive grounds—that the measure required courts to render decisions that conflicted with the President's power to pardon."); Frederic M. Bloom, *Unconstitutional Courses*, 83 Wash. U. L.Q. 1679, 1721 (2005) ("At its core, *Klein* teaches that Congress may not demand that federal courts reach unconstitutional decisions," and "federal courts should never be put in the position of reaching or validating unconstitutional outcomes." (internal quotation marks omitted)); Edward A. Hartnett, *Congress Clears Its Throat*, 22 Const. Comment. 553, 580 (2005) (similar); Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 Geo. Wash. Int'l L. Rev. 521, 586 (2003) ("Perhaps the best understanding of *Klein*'s rule of judicial independence is that Congress cannot legislate so as to require courts to act unconstitutionally ."); Amanda L. Tyler, *The Story of* Klein*: The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts*, in Federal Courts Stories 87, 109 (Vicki C. Jackson & Judith Resnik eds., 2009) (*Klein* holds that Congress cannot "compel the courts to enforce an unconstitutional law or be 'instrumental to that end'" (quoting 80 U.S. at 148)).

understanding both explains the result in *Klein* and conforms to this Court's decisions, including its deeply rooted precedent concerning judicial review More-over, when *Klein* is read in light of background principles that were well known at the time but are less familiar today, the no-unconstitutional-rules-of-decision approach can also solve some riddles about the decision, including the structure of the opinion.

In contrast, the interpretations of *Klein* proposed by petitioner and its *amici* each fail to satisfy at least one of the necessary elements of a sound understanding of the decision. Petitioner's reading—that "Congress may not dictate the outcome of a pending case" (Pet. Br. 43)—fails the second requirement because it conflicts with numerous decisions of this Court. And in attempting to satisfy the second requirement, the reading proposed by petitioner's *amici*—that Congress cannot direct the outcome of a pending case unless it purports to amend the underlying law (*Amici* Br. 4-10)—runs headlong into the first. Congress did purport to amend the underlying law in the statute at issue in *Klein*, and the principle advocated by petitioner's *amici* therefore cannot explain the outcome of the case.

A. *Klein* held that Congress lacks authority to prescribe unconstitutional rules of decision.

1. *Klein* involved a claim for compensation in the Court of Claims in the wake of the Civil War. Union officers had seized and sold Victor Wilson's cotton after the fall of Vicksburg.[8] By statute, the owner of seized property could recover the proceeds of its sale in the Court of Claims "on proof of his ownership

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[8] Young, *supra*, at 1192, 1198.

and that he ha[d] never given any aid or comfort to the present rebellion." Act of Mar. 12, 1863, ch. 120, § 3, 12 Stat. 820, 820 ("1863 statute"). John Klein, as the administrator of Wilson's estate, sought relief under this statute.[9]

Wilson had been a surety on the bonds of two Confederate officers.[10] In *United States v. Padelford*, 76 U.S. 531 (1870), the Supreme Court held that such a suretyship constituted "aid and comfort to the rebellion within the meaning of" the 1863 statute. *Id.* at 539. Both Wilson and Padelford, however, had been pardoned by President Lincoln in accordance with the presidential proclamation of December 8, 1863. *Klein*, 80 U.S. at 131-32. Upon taking an oath of allegiance, that proclamation granted to a wide range of rebels "a full pardon with restoration of all rights of property, except as to slaves, and in property cases where rights of third parties shall have intervened." Proclamation No. 11, 13 Stat. 737, 737 (Dec. 8, 1863). Although *Padelford* understood suretyship as giving comfort to the rebellion, it also held that the recipient of a presidential pardon—at least one who took the required oath prior to the seizure of his property—"was purged of whatever offence against the laws of the United States he had committed and relieved from any penalty which he might have incurred." 76 U.S. at 543.

Consistent with *Padelford*, the Court of Claims held in *Klein* that Wilson's estate was entitled to recover. The government then appealed to the Supreme Court. *Klein*, 80 U.S. at 143. While the appeal was pending, Congress attempted to change the ef-

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[9] Young, *supra*, at 1192.

[10] *Id.* at 1199.

fect of a presidential pardon by attaching a rider to an appropriations bill. *See id.* The rider made a pardon inadmissible in the Court of Claims to prove loyalty, made acceptance of a pardon (without protesting innocence) conclusive evidence of *disloyalty*, and provided that the Supreme Court, in cases in which the Court of Claims had already decided in favor of the claimant based on a pardon, "shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction." Act of July 12, 1870, ch. 251, 16 Stat. 230, 235 ("1870 statute").

2. Invoking the 1870 statute, the government moved to remand *Klein* to the Court of Claims with instructions to dismiss. 80 U.S. at 134. This Court rejected that request. It held that the statute was unconstitutional, denied the government's motion, and affirmed the judgment of the Court of Claims granting recovery to Klein. *Id.* at 145-48.

Chief Justice Chase's opinion for the Court first analyzed "the rights of property, as affected by the late civil war, in the hands of citizens engaged in hostilities against the United States." 80 U.S. at 136. The Court concluded that, as a statutory matter, the seizure of rebel property did not divest the owners of their title to the proceeds from that property. *Id.* at 138. Instead, the government held the property as "trustee" for any owners who made the showing of loyalty required by the 1863 statute. *Id. Padelford* had already held that a pardon was sufficient evidence of loyalty to satisfy the statute, and *Klein* held that the effect of Wilson's pardon was thus to give him an "absolute right" to the "restoration of the proceeds" from his property. *Id.* at 142.

The Court then held that the 1870 statute, which ostensibly nullified Wilson's right to recover by re-

quiring the Court to dismiss, was unconstitutional. It explained that the statute withdrew the Court's jurisdiction "as a means to an end," and that its "great and controlling purpose [was] to deny to pardons granted by the President the effect which this court had adjudged them to have." 80 U.S. at 145. The statute was not, therefore, "an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power." *Id.* at 146. The Court also explained that it could not dismiss the case "without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.* As a result, "Congress ha[d] inadvertently passed the limit which separates the legislative from the judicial power." *Id.* at 147.

The Court next concluded that "[t]he rule prescribed [was] also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive." 80 U.S. at 147. "[T]he legislature cannot," the Court explained, "change the effect of a pardon any more than the executive can change a law," but "this [was] attempted by the provision under consideration." *Id.* at 148. In the Court's view, a pardon "includes amnesty" and "blots out the offence pardoned and removes all its penal consequences." *Id.* at 147 Congress, however, had attempted to deny pardons "their legal effect" by requiring the Court "to receive special pardons as evidence of guilt and to treat them as null and void." *Id.* at 148. The statute therefore "impair[ed] the executive authority and direct[ed] the court to be instrumental to that end." *Id.*

Justice Miller dissented in an opinion joined by Justice Bradley. Justice Miller agreed with the Court

that the 1870 statute was "unconstitutional, so far as it attempts to prescribe to the judiciary the effect to be given to an act of pardon or amnesty by the President." 80 U.S. at 148 (Miller, J., dissenting). He nevertheless disagreed with the Court's decision to affirm the Court of Claims. Justice Miller disputed the Court's conclusion that Wilson had maintained title to his property after it had been seized, and that he could therefore recover the proceeds based on his subsequent pardon. *See id.* at 148-49. In the dissent's view, title had passed to the government at the time of seizure, and the subsequent pardon could not "restore that which ha[d] thus completely passed away." *Id.* at 150.

3. There is widespread agreement among scholars that, although *Klein* is unclear in many respects, it at least stands for the principle that Congress lacks the authority to require the courts to apply an unconstitutional rule of decision.[11] In other words, "Congress may not compel the courts to speak a constitutional untruth."[12]

This understanding satisfies both requirements for a sound interpretation of the precedential effect of *Klein*. First, it explains the result of the case. The Court's opinion held that the 1870 statute was unconstitutional, and that holding is adequately supported by the reasoning that (1) Congress lacks authority to prescribe an unconstitutional rule of decision, and (2) Congress had attempted to prescribe an unconstitutional rule of decision by instructing the Court to dismiss the case and deny recovery to Wil-

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[11] *See supra* note 7.

[12] Meltzer, *supra*, at 2540.

son's estate, a result that would have conflicted with the constitutional effect of Wilson's pardon.[13]

Second, this approach is consistent with the Court's foundational jurisprudence concerning judicial review[14] As the Court explained in *Marbury v. Madison*, 5 U.S. 137 (1803), "the framers of the constitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature." *Id.* at 179-80. Accordingly, "an act of the legislature, repugnant to the constitution," does not "bind the courts, and oblige them to give it effect." *Id.* at 177 In other words, such a statute does not "constitute a rule" that is "operative" in the courts, which must not "close their eyes on the constitution" when they decide cases. *Id.* at 177-78. Indeed, it would be immoral to impose the oath of office on judges "if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support." *Id.* at 180.

B. *Klein* need not be understood to adopt any broader principle concerning Congress's authority to prescribe rules of decision.

1. Petitioner's *amici* do not dispute that *Klein* held that Congress has no power to instruct the courts to apply an unconstitutional rule of decision. Instead, they argue that *Klein* must also have held something more. That is because the opinion "raised

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[13] *See, e.g.*, Fallon et al., *supra*, at 325 ("the Klein judgment is adequately supported by the entirely plausible understanding that the rule of decision whose application Congress directed would have required the courts to abridge the President's pardon power").

[14] *See, e.g.*, Tyler, *supra*, at 109-10.

the pardon issue in the alternative" when it stated that the statute was "'*also* liable to just exception as impairing the effect of a pardon.'" *Amici* Br. 6 n.5 (quoting 80 U.S. at 147). The Court independently held, petitioner's *amici* assert, that the statute had "'passed the limit which separates the legislative from the judicial power'" (*id.* (quoting 80 U.S. at 147)), and it is therefore necessary to give meaning to that holding as well.

This argument undoubtedly has some force.[15] Even on its own terms, however, it has two important limitations. First, even accepting this argument as true, it does not contradict the conclusion that *Klein* at least held that Congress cannot prescribe an unconstitutional rule of decision, and that the 1870 statute violated that principle by prescribing a rule of decision that "impair[ed] the effect of a pardon." 80 U.S. at 147

Second, this argument does not explain *why* Congress had "passed the limit which separates the legislative from the judicial power" in the 1870 statute. 80 U.S. at 147. It is still necessary to construct an understanding of that independent holding that both explains the result in *Klein* and is consistent with this Court's other decisions. For the reasons explained in section I.C, *infra*, the theories that petitioner and its *amici* advocate fail to satisfy these requirements. Thus, even assuming that *Klein* held "something" in addition to the principle that Congress cannot prescribe an unconstitutional rule of

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[15] *See, e.g.*, Lawrence G. Sager, Klein's *First Principle: A Proposed Solution*, 86 Geo. L.J. 2525, 2526 (1998) (making the "alternate ground" argument); Meltzer, *supra*, at 2539 n.12 (acknowledging the appeal of this argument); Hartnett, *supra*, at 573 (same).

decision, petitioner and its *amici* have not successfully identified what that "something" is.

2. In any event, the principle that Congress has no authority to prescribe an unconstitutional rule of decision ultimately explains *both* of the seemingly alternative holdings of *Klein*. That is because, properly understood, both of these alternative holdings rested on the principle that Congress cannot prescribe an unconstitutional rule of decision. The Court issued alternative holdings only because it found two different reasons *why* the 1870 statute prescribed an unconstitutional rule of decision.

As all agree, one of those reasons was that the statute impaired the effect of a pardon and therefore violated the President's constitutional authority. The Court also found, however, that the 1870 statute prescribed an unconstitutional rule of decision—and therefore "passed the limit which separates the legislative from the judicial power" (80 U.S. at 147)—because it violated the independent constitutional principle, extant at the time, that vested rights could not be destroyed.[16]

To understand why, it is helpful to consider the disagreement between the majority and the dissent. For the dissent, there was a critical distinction between a case such as *Padelford*, in which the rebel took the oath and was pardoned prior to the seizure of his property, and *Klein*, in which the rebel took the oath after the seizure of his property. Justice Miller's

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[16] *See* Hartnett, *supra*, at 574-80; *cf.* Chemerinsky, *supra*, at 194 (explaining that the statute at issue in *Klein* could be understood both to infringe the pardon power and "unconstitutionally deprive[] [a person of] property without just compensation or due process," and thus to destroy a "vested right").

view was that, in *Padelford*, because "the possession or title of property remain[ed] in the party, the pardon or amnesty remit[ted] all right in the government to forfeit or confiscate it." 80 U.S. at 150 (Miller, J., dissenting). But he concluded that, in *Klein*, because the property had "already been seized and sold, and the proceeds paid into the treasury," and because that meant (in his view) that title had already passed to the government, it followed that "the pardon [did] not and [could not] restore that which ha[d] thus completely passed away." *Id.*

The majority disagreed that title to Wilson's cotton had ever passed to the government. It emphasized at the outset of its opinion that Wilson's cotton was defined by statute to be "captured and abandoned property," and that this statutory category of property was "known only in the recent war" and had no precedent in history. 80 U.S. at 136, 138. Unlike the dissent, the majority concluded that the title to this "peculiar" form of property was not "divested absolutely out of the original owners" when it was seized. *Id.* Rather, the property went "into the treasury without change of ownership," and the "government constituted itself the trustee for those entitled to the proceeds" under the 1863 statute. *Id.* at 138.

From this perspective, once a property owner like Wilson took the required oath, "the pardon and its connected promises took full effect," and "[t]he restoration of the proceeds became the absolute right of the person[] pardoned." 80 U.S. at 142. Indeed, refusing to restore the proceeds as promised in the presidential proclamation would be a "breach of faith not less 'cruel and astounding' than to abandon the freed

people whom the Executive had promised to maintain in their freedom." *Id.*

This last reference was to the Emancipation Proclamation (Proclamation No. 17, 12 Stat. 1268 (Jan. 1, 1863)), and it is revealing because it clarifies that the pardon played two distinct roles in the majority opinion in *Klein*. One role was to provide the basis for concluding that the 1870 statute "impair[ed] the effect of a pardon, and thus infring[ed] the constitutional power of the Executive." 80 U.S. at 147 The second role was to provide a mechanism by which a right was vested. In this role, there was nothing particularly distinctive about a pardon. Other legal instruments, such as the Emancipation Proclamation or a simple deed, also created vested rights.

The language of vested rights has largely fallen out of our federal constitutional discourse. But it was a dominant feature of the general constitutional law that federal courts developed in diversity cases during the nineteenth century.[17] For example, in *Fletcher v. Peck*, 10 U.S. 87 (1810), this Court ruled that Georgia's attempt to rescind a land grant was unconstitutional. The Court explained: "[I]f an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, [and] those conveyances have vested legal estate." *Id.* at 135. As Chancellor Kent put it, "[a] retrospective statute, affecting and changing vested rights, is very generally considered, in this country as founded on unconstitu-

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[17] *See generally* Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 Tul. L. Rev. 1263, 1264-66, 1268-82 (2000).

tional principles, and consequently inoperative and void."[18]

With this background in mind, it becomes clear that *Klein* held that the 1870 statute prescribed a result that was unconstitutional not only because it impaired the effect of a pardon, but also because it abrogated vested rights. Under more modern doctrine, this second violation might also be understood in due process terms, and *Klein* could be viewed as holding that the statute violated the Fifth Amendment because it purported to deprive a person of property without due process of law.[19] However the second violation is framed, it explains the Court's reasoning that Congress had "passed the limit which separates the legislative from the judicial power" by "prescrib[ing] a rule for the decision of a cause in a particular way." 80 U.S. at 146-47. As explained in section I.C, *infra*, this language cannot be interpreted literally to mean that Congress can *never* prescribe a rule of decision for a pending case. Rather, the problem in *Klein* was a narrower one: Congress had prescribed an "*arbitrary* rule of decision" (*id.* at 146 (emphasis added)), *viz.*, a rule of decision that violated the general constitutional law principle of vested rights.

The "vested rights" approach is further illustrated by the contrast that *Klein* drew with *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1856). *Klein* explained that *Wheeling Bridge* did not

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[18] 1 James Kent, Commentaries on American Law 455 (O.W. Holmes, Jr. ed., 12th ed. 1873).

[19] *See, e.g.*, Chemerinsky, *supra* at 194 (describing this second aspect of *Klein* in terms of both due process and vested rights); Young, *supra*, at 1213-14 & n.136 (describing the vested rights problem in due process terms).

involve a statute that prescribed an "arbitrary rule of decision." 80 U.S. at 146. In *Wheeling Bridge*, the Court had employed traditional vested rights language to explain that, when a "private right[] [has] passed into judgment the right becomes absolute." 59 U.S. at 431. The Court held, however, that the rights at stake in *Wheeling Bridge* were public rights, and Congress could therefore prescribe a rule of decision that contradicted the Court's previous decision concerning those rights. *Id.*; *see also Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1171 (10th Cir. 2004) (McConnell, J.) (explaining the distinction between *Klein* and *Wheeling Bridge* in terms of the difference between public and private rights). Because the statute in *Wheeling Bridge* did not destroy any vested private rights, *Klein* concluded that the rule of decision in *Wheeling Bridge* was not an "arbitrary" one.

The vested rights approach also helps to solve another puzzle posed by *Klein*. The case involved a claim against the United States, and some rationale is needed to justify affirming a judgment against the United States despite its sovereign immunity and a stated congressional policy to deny recovery.[20] The vested rights view provides that rationale: Because the claimant had a vested property right, and because Congress constituted the United States as trustee of the property, it seems to follow that Congress could not (or at least could not be understood to) subsequently divest that vested right by denying a forum in which to assert it.[21] This understanding is consistent with *Klein*'s statement that it is "not entirely accurate" to say that "the right to sue the gov-

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[20] *See* Meltzer, *supra*, at 2539 n.12; Hartnett, *supra*, at 573.

[21] *See* Hartnett, *supra*, at 577.

ernment in the Court of Claims is a matter of favor," and that "[i]t is as much the duty of the government as of individuals to fulfil its obligations." 80 U.S. at 144.

Viewed through the lens of general constitutional law and the principle of vested rights, *Klein* is strikingly similar to a case decided a few years earlier, *Gelpcke v. City of Dubuque*, 68 U.S. 175 (1864). In *Gelpcke*, the city of Dubuque had issued municipal bonds based on then-current understandings of Iowa law. The Iowa Supreme Court subsequently overruled its earlier decisions and held that Dubuque had no authority to issue the bonds. *See id.* at 205. This Court nevertheless held that the bondholders must be paid because the state-court decision could "have no effect upon the past." *Id.* at 206. Under "the law of this court," which "rest[ed] upon the plainest principles of justice," the Court concluded that destruction of rights acquired under a contract, valid when made, "would be as unjust as to hold that the rights acquired under a statute may be lost by its repeal." *Id.* Although state-court rules of decision regarding state laws and constitutions were ordinarily to be followed in federal court, this Court declared that it "shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice." *Id.* at 206-07

Thus, in both *Klein* and *Gelpcke*, this Court refused to be bound by rules of decision, whether prescribed by Congress (*Klein*) or the state courts (*Gelpcke*), that violated the principle of general constitutional law that vested rights could not be destroyed. And, in *Klein*, this violation was an alternative reason why the 1870 statute prescribed an un-

constitutional rule of decision, in addition to its infringement of the pardon power.

Ultimately, therefore, this Court's reasoning in *Klein* took the following form: (1) Congress lacks the authority to bind courts to apply an unconstitutional rule of decision; and (2) the 1870 statute improperly sought to bind courts to apply an unconstitutional rule of decision (a) because it violated the general constitutional law principle of vested rights (or more modern principles of due process), and (b) because it also impaired the effect of a pardon. In other words, *Klein* issued alternative holdings only with respect to the reason why the statute violated the principle that Congress cannot prescribe an unconstitutional rule of decision. It did not issue a holding that was an alternative to that principle itself. The opinion therefore need not be interpreted to adopt any other, broader principle concerning Congress's authority to prescribe rules of decision.

C. The contrary understandings advanced by petitioner and its *amici* are flawed.

Petitioner and its *amici* nevertheless urge the Court to adopt broader interpretations of *Klein*. Each of these interpretations would, on separation-of-powers grounds, limit Congress's authority to prescribe rules of decision in pending cases, even if those rules of decision would not violate any independent constitutional principle. Neither of these proposed interpretations, however, can withstand scrutiny. Each fails at least one of the basic requirements that are necessary to a sound understanding of the precedential effect of *Klein*.

1. Petitioner argues that *Klein* "held that Congress may not dictate the outcome of a pending case." Pet. Br. 43. Petitioner grounds that argument in *Klein*'s statement that Congress had improperly "'prescribe[d] rules of decision to the Judicial Department of the government in cases pending before it.'" *Id.* (quoting 80 U.S. at 146).

Petitioner's argument, however, cannot be squared with this Court's decisions. It has been clear since *United States v. Schooner Peggy*, 5 U.S. 103 (1801), that a court must apply the law as it finds it at the time of decision, including statutory changes made while the case is pending. *See id.* at 110. Numerous decisions of this Court have followed this deeply rooted requirement and applied new statutes to pending cases, even when the statutes effectively dictated the outcome.[22] As scholars have concluded, therefore, *Klein* cannot be read literally to stand for the principle that Congress lacks the authority to prescribe a rule of decision that would dictate the outcome of a pending case.[23] In fact, petitioner's own *amici* disavow this broad interpretation of *Klein* because it conflicts with this Court's decisions. *See Amici* Br. 7

2. Petitioner's *amici* attempt to avoid this conflict with the Court's decisions by reading *Klein* more

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[22] *See, e.g.*, *Miller v. French*, 530 U.S. 327, 344, 349 (2000); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 434-35, 441 (1992); *Carpenter v. Wabash Ry. Co.*, 309 U.S. 23, 27 (1940); *Wheeling Bridge*, 59 U.S. at 429-31.

[23] *See* Fallon et al., *supra*, at 324 ("It is doubtful that this language can be taken at face value, for congressional power to make valid statutes retroactively applicable to pending cases has often been recognized."); *see also, e.g.*, Tyler, *supra*, at 105-06; Hartnett, *supra*, at 578.

narrowly than petitioner. According to them, *Klein* stands for the principle that Congress cannot direct the outcome of a pending case unless it at least purports to "amend[] the underlying law." *Amici* Br. 4.[24]

The problem with this argument is that, in attempting to satisfy the second requirement for a successful understanding of *Klein*, petitioner's *amici* lose sight of the first: The principle that they identify as the holding cannot explain the result in *Klein*. Congress *did* purport to amend the underlying law in the 1870 statute at issue in *Klein*. Thus, the Court's ruling that the statute was unconstitutional cannot have rested on the principle that purporting to amend the law is a necessary condition for a statute to be valid.

On its face, the 1870 statute unambiguously purported to amend the law in numerous respects. For example:

- It provided that "no pardon or amnesty granted by the President , shall be

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[24] This appears to be the position of petitioner's *amici*, even though it is not exactly what they say. *Amici* state that, under *Klein*, "Congress may not direct the result in a pending case without amending the underlying law." *Amici* Br. 4. But if the problem in *Klein* was only that Congress did not "amend the law," that problem would be fully explained by the no-unconstitutional-rules-of-decision approach advocated here. Because Congress has no authority to prescribe an unconstitutional rule of decision, Congress *could not* have amended the law through the 1870 statute, and therefore necessarily failed to do so. *Cf.* Resp. Br. 29. We understand petitioner's *amici*, however, to be making a different, broader point—that the statute in *Klein* was unconstitutional not only because it failed to amend the law due to a lack of congressional authority, but also because it did not even *purport to* amend the law.

admissible in evidence in support of any claim against the United States."

- It provided that the proof of loyalty required by prior statutes must be made "irrespective of the effect of any executive proclamation, pardon, amnesty, or other act of condonation or oblivion."
- It provided that, in cases in which the Court of Claims had already entered judgment in favor of a claimant "on any other proof of loyalty than such as is above required and provided, and which is hereby declared to have been and to be the true intent and meaning" of the prior statutes, "the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction."
- It provided that, if a person accepted a pardon for participating in the rebellion without an express disclaimer of guilt, the "pardon and acceptance shall be taken and deemed conclusive evidence" of disloyalty.

16 Stat. 235.

Although much of the statute employed the language of evidence, that is not itself constitutionally problematic because "Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution." *Dickerson v. United States*, 530 U.S. 428, 437 (2000). Moreover, it has long been recognized that conclusive presumptions are rules of law. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110,

119 (1989) (plurality op.) ("While § 621 is phrased in terms of a presumption, that rule of evidence is the implementation of a substantive rule of law.").[25] Indeed, so long as no independent constitutional barrier is crossed, a rule of law is no less valid because it defines words (such as "loyalty") in unusual ways.[26] Perhaps petitioner's *amici*, like other commentators, object to achieving substantive results through the language of evidence and procedure, or through the use of unorthodox definitions.[27] But their preferred approach would be a departure from this Court's decisions.[28]

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[25] *See also, e.g.*, 9 J. Wigmore, Evidence § 2492 (3d ed. 1940) (explaining that a "conclusive presumption" is, in fact, a "rule of substantive law").

[26] *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 24 (1976) (rejecting the argument that "Congress' choice of statutory language can invalidate [an] enactment when its operation and effect are clearly permissible"); *see also, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012) (observing that the Court has "applied the Anti-Injunction Act to statutorily described 'taxes' even where that label was inaccurate"); *Lopez v. Gonzales*, 549 U.S. 47, 54 (2006) (like Humpty Dumpty, legislatures "are free to be unorthodox" in their use of language); *W. Union Tel. Co. v. Lenroot*, 323 U.S. 490, 502 (1945) ("Of course, statutory definitions of terms used therein prevail over colloquial meanings.").

[27] *See, e.g.*, Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 Mercer L. Rev. 697, 717 (1995) ("If government wishes to attain a particular public policy, our constitutional democratic theory dictates that government do so openly "); *see also* Sager, *supra*, at 2529 (interpreting *Klein* to mean that "[t]he judiciary will not allow itself to be made to speak and act against its own best judgment on matters within its competence which have great consequence for our political community").

[28] *See* Redish, *supra*, at 716-18 (arguing that, on his view, the Court was "incorrect" in *Michael H.* when it treated a conclu-

Petitioner's *amici* offer no other explanation for their position that the statute in *Klein* did not purport to amend the law. Nor do they identify any support for that position in *Klein* or elsewhere in this Court's cases. They mention the passage in *Klein* in which the Court observed that the statute in *Wheeling Bridge* had created "new circumstances," whereas "no new circumstances" were created by the 1870 statute. 80 U.S. at 147; *see Amici* Br. 8. But that was a statement about the legal *effect* of the statute, not what it purported to do. The reason that the 1870 statute failed to create "new circumstances" was because "Congress had no authority to create any." Resp. Br. 29.

Petitioner's *amici* also rely on this Court's decision in *Robertson*. *Amici* Br. 8-9. *Robertson*, however, did not suggest that the statute in *Klein* was an example of a statute that failed to purport to amend the law, or that *Klein* was decided on that basis. Instead, as petitioner's *amici* acknowledge (*id.* at 9-10), *Robertson* assumed without deciding that the Ninth Circuit correctly interpreted *Klein* to require that the law be amended. 503 U.S. at 441. This Court proceeded to reverse the Ninth Circuit on the ground that the statute in *Robertson* did amend the law. *See id.* The Court therefore declined to reach the question whether *Klein* stands for the conclusion that petitioner's *amici* attribute to it here—namely, that the 1870 statute was unconstitutional because it did not purport to amend the law.

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sive presumption as a legal rule); Sager, *supra*, at 2533 (concluding that *Klein* is "a good and sufficient reason to invalidate RFRA").

To be clear, we do not take issue with the abstract principle advocated by petitioner's *amici*—that Congress cannot dictate the outcome of a pending case without purporting to amend the underlying law. Nor do we disagree that, at least in theory, this principle might "serve[] important separation of powers values." *Amici* Br. 10. We do think, however, that respect for Congress and the President, as well as principles of constitutional avoidance, counsel in favor of interpreting a statute to amend the underlying law whenever fairly possible. *See Robertson*, 503 U.S. at 441. And we ultimately part company with petitioner's *amici* when they take the position that the statute in *Klein* is an *example* of a statute that did not purport to amend the underlying law That position is incorrect, *Klein* did not hold it, and petitioner's *amici* fail to offer any support for it.

Although this disagreement might seem (literally) academic, it has significant consequences. When the statute in *Klein* is treated as an example of a statute that did not purport to amend the law, it follows that any statute that is similar to the statute in *Klein* also does not purport to amend the law, and thus is equally unconstitutional. The danger, therefore, is that courts will erroneously conclude that statutes are invalid solely on the basis of *Klein*, even if *Klein* itself would have viewed those statutes as valid. That would give *Klein* a far broader sweep than it warrants as a matter of *stare decisis*, and would give rise to unnecessary constitutional confrontations between the courts and Congress—including in this case.

A counterfactual that is based on *Klein* illustrates the point. Suppose that, in 1870, Congress had been controlled by the Democrats rather than the

Republicans. Suppose further that the Democrats believed, contrary to *Padelford*, that persons who had merely signed surety bonds for Confederate officers should not be treated as disloyal on that ground alone. If Congress had amended the law while cases brought by such persons were pending to declare that they were loyal for purposes of recovering under the 1863 statute, is it conceivable that this Court would have found that statute unconstitutional and denied recovery?

Certainly not. Yet petitioner's *amici* would view this statute as having the same constitutional flaw as the statute in *Klein*. Under a correct interpretation of *Klein*, in contrast, there is no constitutional problem with this counterfactual statute because it does not prescribe an unconstitutional result. It does not attempt to force this Court to decide a case notwithstanding its view of the pardon power, to destroy vested rights, or to violate the Due Process Clause. This hypothetical illustrates that the true problem in *Klein* was not that the 1870 statute failed to purport to amend the law. It was instead that it purported to amend the law in a manner that prescribed an unconstitutional rule of decision.

* * *

Properly understood, *Klein* does not cast doubt on the constitutionality of the statute at issue in this case. Petitioner and its *amici* do not argue that 22 U.S.C. § 8772 prescribes an unconstitutional rule of decision by directing an outcome that would violate an independent constitutional principle. And, unlike the statute in *Klein*, Section 8772 does not interfere with vested rights because it concerns remedies, not

rights.[29] Petitioner therefore cannot prevail under *Klein*.

II. There is no freestanding constitutional rule against legislating with respect to a single case.

Petitioner's *amici* also argue that, even if Section 8772 is consistent with *Klein*, it still violates the separation of powers because it purports to "legislate with respect to a single case." *Amici* Br. 20. That argument fails because the principle invoked by petitioner's *amici* cannot be squared with the constitutional text, historical evidence of its meaning, or this Court's decisions.

Text. The Constitution's text is sharply at odds with the proposition that Congress cannot legislate with respect to a single case. Unlike the constitutions of many of the States, the U.S. Constitution does not contain any wholesale prohibition on special or retroactive legislation. *See Paramino Lumber Co. v. Marshall*, 309 U.S. 370, 380 (1940).[30] The U.S. Constitution instead rules out only particular (and particularly harsh) categories of such legislation.

For example, the *Ex Post Facto* Clause applies only in the criminal context—it prohibits "retroactively alter[ing] the definition of crimes or in-

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[29] *See* Hartnett, *supra*, at 580 n.146 ("Even in the heyday of vested rights jurisprudence, the Supreme Court distinguished between laws that affected the right and laws that affected the remedy, permitting retroactive remedial laws."); *id.* (citing decisions).

[30] *See also id.* at 380 n.24 (observing that there were "restrictions against the enactment of special legislation in the constitutions of all the states except Connecticut, Massachusetts, New Hampshire and Vermont").

creas[ing] the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43 (1990). The Bill of Attainder Clause has a similarly limited scope—it "prohibit[s] legislatures from singling out disfavored persons and meting out summary *punishment* for past conduct." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) (emphasis added). Moreover, the Equal Protection Clause limits Congress's power to legislate with respect to particular persons or subjects, but only if it lacks a legitimate reason for doing so. *Cf. Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 300-01 (1990) (Scalia, J., concurring). None of these clauses, nor any other provision of the Constitution, limits Congress's power to legislate on grounds of specificity alone.

Petitioner's *amici* nevertheless argue that these constitutional provisions "do[] not exhaust the requirement of legislative generality." *Amici* Br. 20. In their view, because these provisions are motivated by separation-of-powers concerns, and because those concerns are "no less salient" in other circumstances in which Congress legislates with specificity (*id.* at 21), Congress also violates the separation of powers by legislating with specificity even if it does not violate any of these particular textual provisions. *See id.* at 20-22.

That argument turns the proper understanding of these constitutional provisions on its head. The fact that the Constitution explicitly prohibits particular kinds of specific legislation is powerful evidence that it does *not* prohibit *other* kinds of specific legislation, not evidence that the Constitution *does* prohibit other kinds of specific legislation. Indeed, if the Constitution imposed a freestanding limitation on legislating with respect to a single case, there

would be no need for the Constitution even to contain a Bill of Attainder Clause, much less for courts to have developed an "extensive jurisprudence" concerning its limitations. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995); *see also* Resp. Br. 39-40.

Amici's invocation of the separation-of-powers concerns that motivate these constitutional provisions also does not support their conclusion. It is no doubt true that specific legislation might sometimes present a separation-of-powers concern even when it is not an *ex post facto* law or a bill of attainder. By expressly precluding only some types of specific legislation, however, the Constitution reflects a judgment that only those types of specific legislation present sufficiently serious separation-of-powers concerns to warrant limiting Congress's authority. It would overrule that judgment to conclude that other types of specific legislation present separation-of-powers concerns of the same magnitude and should therefore be unconstitutional as well. Ultimately, that would be no different from the "penumbras and emanations" approach to constitutional interpretation: treating the clauses prohibiting bills of attainder and *ex post facto* laws as having emanations that cast penumbras, thereby creating a broad right to general laws.

History. Consistent with the constitutional text, Congress has regularly enacted special or private legislation from the founding to the present day. *See, e.g.*, *Plaut*, 514 U.S. at 239 n.9 ("Private bills in Congress are still common, and were even more so in the days before establishment of the Claims Court.").[31]

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[31] *See also, e.g.*, 6 Stat. (1846) (entire volume devoted to private laws); Act of Apr. 5, 1800, ch. 20, 6 Stat. 40 (discharging Robert

Indeed, many congressional powers have long been understood to authorize individualized legislation. For example, Congress's historical exercise of its authority confirms that the power to "pay the Debts" of the United States is the power to pay particular debts; the power to "establish Post Offices and post Roads" is the power to establish particular offices and roads; and the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" is the power to issue particular patents and copyrights.[32] Similarly, the power to "declare War" is the power to declare particular wars between the United States and particular enemies,[33] and Congress is therefore undoubtedly free to treat particular foreign nations differently based on whether the United States is on "good terms" with them. *Contra Amici* Br. 23.

Sturgeon from prison); *INS v. Chadha*, 462 U.S. 919, 954 (1983) (noting Congress's "long experience" with the "private bill procedure"); Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution From a Legislative to a Judicial Model of Payment*, 45 La. L. Rev. 625, 644 (1985) ("By 1832, half of Congress' time was consumed with such private business—Friday and Saturday being fully set aside for such purposes.").

[32] U.S. Const. art. I, § 8; *see, e.g.*, Act of Mar. 3, 1821, ch. 60, 6 Stat. 262 (directing payment to Robert Buntin); Act of Feb. 20, 1792, ch. 7, 1 Stat. 232 (establishing various postal roads, including one from "Wisscassett in the district of Maine, to Savannah in Georgia," and specifying the route); Act of Mar. 3, 1821, ch. 57, 6 Stat. 261 (authorizing the Secretary of State to issue a patent to Thomas Oxley for his invention, "The American Land Clearing Machine and Land Clearing Engine").

[33] U.S. Const. art. I, § 8; *see, e.g.*, Act of Apr. 6, 1917, ch. 1, 40 Stat. 1 (declaring a state of war between the United States and the Imperial German Government).

The same is true for the canonical example of an implied power of Congress—the power to create a corporation. *See McCulloch v. Maryland*, 17 U.S. 316 (1819). Congress has never passed a general incorporation law, and instead has incorporated particular corporations, ranging from the Bank of the United States (Act of Feb. 25, 1791, ch. 10, 1 Stat. 191) to the American Red Cross (Act of Feb. 5, 1905, ch. 23, 33 Stat. 599).

Contrary to the argument of petitioner's *amici*, these examples of Congress's express and implied powers to enact specific legislation are not limited to "Congress's Article IV power to 'dispose' of government property or its general implicit authority to regulate the United States' own conduct in litigation." *Amici* Br. 24. Nor are they limited to "public rights." *Id.* Congress's power to issue particular patents and copyrights, for example, implicates private rights. *See* Resp. Br. 41. Thus, contrary to *amici*'s position, these examples reflect that Congress has historically exercised its "general legislative power" in ways that were "directed at particular individuals or entities." *Amici* Br. 24. The supposed principle against legislating with respect to a specific case is fundamentally inconsistent with this history.

Precedent. The theory that Congress cannot legislate with respect to a single case also has no basis in this Court's decisions. Petitioner's *amici* invoke *United States v. Brown*, 381 U.S. 437 (1965). *Amici* Br. 19-20. But *Brown* merely explained that the Bill of Attainder Clause should be interpreted in light of the separation-of-powers purposes that it was meant to serve, including the objective of safeguarding against "trial by legislature." 381 U.S. at 442. *Brown* did not suggest that those separation-of-powers con-

cerns also justified imposing an independent, atextual restraint on other types of specific legislation.

Petitioner's *amici* also rely on several concurring opinions. *Amici* Br. 21-22 & nn.20-21. To be sure, Justice Powell expressed concern about legislative specificity in *Chadha*, and would have ruled that the House of Representatives had violated the separation of powers because it had acted judicially rather than legislatively in resolving that "six specific persons" should be deported. 462 U.S. at 964-66 (Powell, J., concurring in the judgment). The *Chadha* majority, however, squarely rejected Justice Powell's view. The Court found it "clear" that the House's action "was an exercise of legislative power" because it "had the purpose and effect of altering the legal rights, duties and relations of persons outside the legislative branch." *Id.* at 952, 957 (majority op.). Indeed, the Court observed that Congress presumably had the power to "mandat[e] a particular alien's deportation, unless, of course, other constitutional principles place substantive limitations on such action." *Id.* at 935 n.8.

Similarly, in *Plaut*, the majority expressly disputed the concurrence's position that specific legislation poses separation-of-powers concerns—or at least concerns sufficient to render such legislation unconstitutional. *See* 514 U.S. at 239 & n.9; *id.* at 241-43 (Breyer, J., concurring in the judgment). "[L]aws that impose a duty or liability upon a single individual or firm," the Court explained, "are not on that account invalid." *Id.* at 239 n.9 (majority op.). In fact, "Congress may legislate 'a legitimate class of one.'" *Id.* (quoting *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 472 (1977)).

Finally, petitioner's *amici* cite Justice Scalia's concurring opinion in *Cruzan*. *Amici* Br. 22. But that opinion could not have more clearly explained that it viewed the Equal Protection Clause—not an unenumerated constitutional right against statutory specificity—as individual citizens' principal protection against oppressive laws. *See* 497 U.S. at 300-01 (Scalia, J., concurring).

* * *

Because the position advocated by petitioner's *amici* lacks legal or historical support, it is not surprising that it would also produce absurd results. Two examples suffice to make this clear.

First, imagine that, in 1952, Congress had acted swiftly in response to President Truman's seizure of the steel mills, and had explicitly ratified that seizure—thereby providing precisely the authorization that this Court found was necessary but lacking. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-86 (1952); *see also id.* at 635-38 (Jackson, J., concurring).

Second, suppose that President Obama had confiscated the Iranian assets involved in this case based on 50 U.S.C. § 1702(a)(1)(C),[34] but petitioner disputed whether the requirements of that statute were satisfied. And suppose that, before this Court ruled, Congress ratified that presidential action by

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[34] "[W]hen the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, [the President may] confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States." 50 U.S.C. § 1702(a)(1)(C).

declaring it consistent with Section 1702. *Cf. Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981).

The statutes in both examples are squarely governed by the rule proposed by petitioner's *amici*: "A law confined to a single pending case is a legislative trial, and therefore unconstitutional." *Amici* Br. 27. But can it be true that, in either example, the correct result would be to refuse to follow the statute because it applies only to a single case, rather than to deem the statute to justify the President's action? We think not. It follows that the rule proposed by petitioner's *amici* cannot be correct, and cannot cast constitutional doubt on Section 8772.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 14-770

IN THE

Supreme Court of the United States

BANK MARKAZI, THE CENTRAL BANK OF IRAN,
Petitioner,

v.

DEBORAH H. PETERSON, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

A. Section 8772 Is A Valid Exercise Of Legislative Authority 7

B. Section 8772 Is Valid Even If The Consolidated Actions Here Are Treated As A Single Case 9

C. Section 8772 Is Valid Even If It Effectively Resolves This Case 18

1. *Klein* does not apply when Congress amends the underlying law 18

2. The unique considerations in *Klein* are absent here 21

D. Section 8772's Constitutionality Is Reinforced By The Political Branches' Power To Regulate Foreign Affairs 25

CONCLUSION 29

APPENDIX

TABLE OF AUTHORITIES

CASES

Page(s)

Biodiversity Associates v. *Cables*, 357 F.3d 1152 (10th Cir. 2004) 14, 17

Buckley v. *Valeo*, 424 U.S. 1 (1976) 8

Chicago & Southern Air Lines, Inc. v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948) 6, 26

City of New York v. *Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008) 21

Dennis v. *Higgins*, 498 U.S. 439 (1991) 20

Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792) 3, 6, 9

Ileto v. *Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009) 20

In re Clinton Bridge, 77 U.S. (10 Wall.) 454 (1870) 11, 13

In re NSA Telecommunications Records Litigation, 671 F.3d 881 (9th Cir. 2011) 20-21

INS v. *Chadha*, 462 U.S. 919 (1983) 8, 13

Japan Whaling Ass'n v. *American Cetacean Society*, 478 U.S. 221 (1986) 6

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 5-6, 24

Miller v. *French*, 530 U.S. 327 (2000) 14

Mistretta v. *United States*, 488 U.S. 361 (1989) 10

National Coalition to Save Our Mall v. *Norton*, 269 F.3d 1092 (D.C. Cir. 2001) 14-15, 17

TABLE OF AUTHORITIES—Continued

Page(s)

Nixon v. *Administrator of General Services*, 433 U.S. 425 (1977) 13, 15, 17

Pennsylvania v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856) 11, 14

Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) ..... *passim*

Pope v. *United States*, 323 U.S. 1 (1944) 13, 19

Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 13, 15

Republic of Austria v. *Altmann*, 541 U.S. 677 (2004) 28

Republic of Mexico v. *Hoffman*, 324 U.S. 30 (1945) 27

Robertson v. *Seattle Audubon Society*, 503 U.S. 429 (1992) 3, 5-6, 8-9, 18

Roeder v. *Islamic Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003) 12

Schooner Exchange v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812) 26

SeaRiver Maritime Financial Holdings Inc. v. *Mineta*, 309 F.3d 662 (9th Cir. 2002) 14, 15

Selective Service System v. *Minnesota Public Interest Research Group*, 468 U.S. 841 (1984) 17

United States v. *Klein*, 80 U.S. (13 Wall.) 128 (1872) 4, 12, 18, 20-25, 28

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Padelford*, 76 U.S. (9 Wall.) 531 (1870) 21-22

United States v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) 14

United States v. *Sioux Nation of Indians*, 448 U.S. 371 (1980) 13, 25

Verlinden B.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) 26

Vermont v. *New York*, 417 U.S. 270 (1974) 6

Village of Willowbrook v. *Olech*, 528 U.S. 562 (2000) 17

Wayman v. *Southard*, 23 U.S. (10 Wheat.) 1 (1825) 5

Williams-Yulee v. *Florida Bar*, 135 S. Ct. 1656 (2015) 16

Williamson v. *Lee Optical of Oklahoma Inc.*, 348 U.S. 483 (1955) 16, 17

Yakus v. *United States*, 321 U.S. 414 (1944) 5, 8

Yee v. *City of Escondido*, 503 U.S. 519 (1992) 17

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 10

Zivotofsky v. *Clinton*, 132 S. Ct. 1421 (2012) 26

Zivotofsky v. *Kerry*, 135 S. Ct. 2076 (2015) 10

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES

22 U.S.C.
§ 8711 ..... 7, 27
§ 8772 ..... *passim*
§ 8772(a)(1) 7-9
§ 8772(a)(2) 9

50 U.S.C.
§ 1885a 20
§ 1885a(i) 20

Abandoned and Captured Property Act, ch. 120, 12 Stat. 820 (1863) 21

Act of February 27, 1942, ch. 122, 56 Stat. 1122 11

An Act to Amend the Indian Claims Commission Act of August 13, 1946, and for Other Purposes, Pub. L. No. 95-243, 92 Stat. 153 (1978) 11

An Act to Expedite the Construction of the World War II Memorial in the District of Columbia, Pub. L. No. 107-11, 115 Stat. 19 (2001) 11

An Act Making Appropriations for the Department of the Interior and Related Agencies for the Fiscal Year Ending September 30, 1990, and for Other Purposes, Pub. L. No. 101-121, 103 Stat. 701 (1989) 11

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-77, 115 Stat. 748 (2001) 12

TABLE OF AUTHORITIES—Continued

Page(s)

Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (2008) 20

Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214 ..... 2, 3, 7, 27

Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, 88 Stat. 1695 (1974) 11

Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, 116 Stat. 820 (2002) 11

EXECUTIVE AUTHORITIES

Congressional Authority to Modify an Executive Agreement Settling Claims Against Iran, 4 Op. O.L.C. 289 (1980) 28

Constitutional Issues Raised by Commerce, Justice, and State Appropriations Bill, 25 Op. O.L.C. 279 (2001) 2, 12, 28

Constitutionality of a Judicial Review Provision Providing for Automatic Affirmance of Agency Decisions, 9 Op. O.L.C. 118 (1985) 2, 7

Constitutionality of Congress' Disapproval of Agency Regulations by Resolutions Not Presented to the President, 4 Op. O.L.C. 21 (1980) 8

TABLE OF AUTHORITIES—Continued

Page(s)

Constitutionality of Legislation Limiting the Remedial Powers of the Inferior Federal Courts in School Desegregation Litigation, 6 Op. O.L.C. 1 (1982) 2

Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 33 Op. O.L.C. 1 (2009) 23

Constitutionality of the Federal Advisory Committee Act, 1 Op. O.L.C. Supp. 502 (1974) 22

Possible Participation by the United States in Islamic Republic of Iran v. Pahlavi, 4 Op. O.L.C. 160 (1980) 27

Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995, 20 Op. O.L.C. 253 (1996) 23

Placing of United States Armed Forces Under United Nations Operational or Tactical Control, 20 Op. O.L.C. 182 (1996) 23

Section 609 of the FY 1996 Omnibus Appropriations Act, 20 Op. O.L.C. 189 (1996) 23

The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124 (1996) 1, 6

TABLE OF AUTHORITIES—Continued

Page(s)

Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011, 35 Op. O.L.C. __ (Sept. 19, 2011) 26

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Locke, John, *Two Treatises of Government* (1690) (Peter Laslett ed., Cambridge Univ. Press 1988) 5

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INTEREST OF AMICI CURIAE[1]

Amici curiae are former senior officials of the Office of Legal Counsel, U.S. Department of Justice, who have served in administrations of both political parties and who have substantial background in and experience with questions involving the constitutional separation of powers.[2] Exercising authority delegated by the U.S. Attorney General, the Assistant Attorney General in charge of the Office of Legal Counsel provides authoritative legal advice to the President and all Executive Branch agencies. The Office drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the Executive Branch, and offices within the Department of Justice.

Although the Office of Legal Counsel frequently advises on constitutional questions concerning the Executive Branch's actions or the relationship between the Executive Branch and a coordinate branch of government, *see, e.g.*, *The Constitutional Separation of Powers Between the President and Congress* ("*OLC Separation of Powers Op.*"), 20 Op. O.L.C. 124 (1996), the Office also provides legal advice on constitutional questions concerning a coordinate branch's actions or the relationship between the coordinate branches when there is occasion to do so, including in the course of re-

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[1] Letters consenting to the filing of this brief are on file with the Clerk. No counsel for a party authored any portion of this brief, and no person other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] A complete list of amici is set forth in the appendix to this brief.

viewing pending legislation for the President's consideration, *see, e.g.*, *Constitutional Issues Raised by Commerce, Justice, and State Appropriations Bill* ("*OLC Iran Op.*"), 25 Op. O.L.C. 279, 284-285 (2001) (opining on the constitutionality of proposed legislation that would divest Iran of sovereign immunity for one suit); *Constitutionality of a Judicial Review Provision Providing for Automatic Affirmance of Agency Decisions* ("*OLC Affirmance Op.*"), 9 Op. O.L.C. 118, 119-122 (1985) (opining on the constitutionality of proposed legislation that deemed agency decisions to be affirmed if the reviewing court did not rule on a petition for review within the prescribed period); *Constitutionality of Legislation Limiting the Remedial Powers of the Inferior Federal Courts in School Desegregation Litigation*, 6 Op. O.L.C. 1, 9-10 (1982) (opining on the constitutionality of proposed legislation that would limit the power of courts to order busing remedies).

Amici have differing views on many constitutional questions, but share a steadfast commitment to the Constitution's separation of powers. Amici file this brief to set forth their view that section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214 (codified at 22 U.S.C. § 8772), is consistent with the constitutional separation of powers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Article I of the Constitution vests Congress with the "legislative Power[]," the core of which is the authority to make and amend law. Constitutional structure, historical practice, opinions of the Office of Legal Counsel, and the Court's precedents all establish that Congress ordinarily may exercise that legislative power broadly or narrowly—including with respect to spe-

cific subjects and particular parties—and that courts are bound to apply that law, even to cases pending at the time Congress enacted or amended the law. Because section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012 (codified at 22 U.S.C. § 8772) is a valid exercise of Congress's prerogative to amend the law with respect to pending cases, it is consistent with the separation of powers.

To be sure, the Court appropriately has recognized important limits on congressional actions that interfere with Article III's vesting of the "judicial Power" in the Judicial Branch. Under the Court's precedents, and consistent with the foundational principle that it is the province of the Judicial Branch to say what the law is, Congress may not usurp a court's power to interpret and apply the law to the set of facts before it. *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 438 (1992). Nor may Congress sit in review of judicial decisions or grant the Executive Branch the authority to do the same. *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 (1792). Finally, Congress may not reopen or revise already final judgments. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218-219 (1995). Because § 8772 does not transgress any of those limits, it does not violate Article III or general separation of powers principles.

Petitioner does not seriously contest those points. Instead, petitioner argues that Congress acts unconstitutionally when it amends existing law as applied to a single pending "case." Although other constitutional provisions might constrain Congress's authority to enact special rules for single cases in some circumstances, the view that the separation of powers does not prevent Congress from legislating narrowly, even with respect to a single pending case, is supported by congressional practice since the founding, the Court's opinions,

and the considered judgment of the Executive Branch. Indeed, petitioner's proposed "single case" rule would be unworkable in practice, as this case illustrates: respondents' "case" actually comprises more than 1,000 claims brought by the representatives of hundreds of Americans killed in multiple Iran-sponsored terrorist attacks. These claims were asserted in at least eighteen different lawsuits and have now been consolidated into a single class action solely because they are all seeking collection of judgments with regard to the same assets. Congress's authority to legislate cannot turn on how many pending cases a law affects, whether inadvertently or by design.

Nor does the fact that § 8772 might effectively dictate the outcome of this litigation render the statute unconstitutional under *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). As the Court has held, whatever the precise scope of *Klein*, its principles do not apply when Congress amends the underlying law that governs a pending case. That is true even when the facts of a case might be undisputed or the amended law is all but dispositive of pending legal claims, as decisions of this Court and the courts of appeals have long established. Beyond that, *Klein* involved a statute that presented an exceptional set of concerns: a Reconstruction-era Congress was effectively manipulating the jurisdiction of the federal courts in an attempt to nullify the President's exercise of his constitutionally based pardon power and the courts' own power to interpret the law. Those same considerations are not present here.

Finally, whatever limits on congressional power might be inferred from *Klein* or other cases, those limits should not apply in a case such as this, in which the political branches amend existing rules governing exe-

cution against a foreign state's property in satisfaction of judgments against a foreign state. In light of the exclusive authority of the political branches to regulate foreign affairs, as well as the well-established practice prior to the Foreign Sovereign Immunities Act of deferring to the political branches' case-by-case sovereign immunity determinations, any limits imposed by the separation of powers on Congress's authority to legislate with respect to a single case (or series of related cases) would not apply to § 8772.

ARGUMENT

The Framers of the Constitution established a system of government in which the Article III judicial power is the power "to determine all differences according to the established law," while the Article I legislative power is the authority to make that "established law." Locke, *Two Treatises of Government* 295-296 (1690) (Laslett ed., Cambridge Univ. Press 1988); *see also, e.g.*, *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825) ("The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law ...."); *Yakus* v. *United States*, 321 U.S. 414, 424 (1944) ("The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct ...."); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Under this constitutional framework, Congress exercises its constitutional prerogatives when it "set[s] out substantive legal standards for the Judiciary to apply," either by enacting new law or by amending existing law. *Plaut*, 514 U.S. at 218; *see also Seattle Audubon*, 503

U.S. at 438 (Congress acts within its constitutionally assigned authority when it "compel[s] changes in law").

Of course, even when exercising legislative power, Congress may violate the separation of powers by encroaching upon, or self-aggrandizing at the expense of, another branch's constitutional functions or powers. *See, e.g.*, *OLC Separation of Powers Op.*, 20 Op. O.L.C. at 127. The Court's decisions have recognized several such limits with respect to the Judiciary. Congress may not usurp the courts' power to interpret the law, *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("one of the Judiciary's characteristic roles is to interpret statutes"); *Marbury*, 5 U.S. at 177, nor may it "direct any particular findings of fact or applications of law, old or new, to fact," *Seattle Audubon*, 503 U.S. at 438; *see also Vermont* v. *New York*, 417 U.S. 270, 277 (1974) (judicial power "embraces application of principles of law or equity to facts"). Congress also may not interfere with the courts' "power, not merely to rule on cases, but to *decide* them"—that is, to "render dispositive judgments." *Plaut*, 514 U.S. at 218-219 (quotation marks omitted). Thus, Congress may not "sit as a court of errors" reviewing the decisions of federal courts, nor allow Executive Branch officials to do so. *Hayburn's Case*, 2 U.S. at 410; *see also Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948). Finally, Congress may not reopen final judgments. *Plaut*, 514 U.S. at 218.

However, outside those specific circumstances, Congress acts within constitutional bounds when it enacts or amends rules to be applied by the Judiciary, as the Office of Legal Counsel has previously explained: "Congress has the constitutional authority to enact laws establishing the framework within which judicial decisions must be made. It has broad authority to pre-

scribe rules of practice and procedure, to define and limit jurisdiction, and to limit remedies available to litigants. In addition, Congress prescribes the substantive law that governs judicial decisions." *OLC Affirmance Op.*, 9 Op. O.L.C. at 121 (footnotes omitted). Consistent with these principles, § 8772 falls squarely within Congress's legislative power to make and "amend[] applicable law." *Plaut*, 514 U.S. at 218 (quotation marks omitted).

A. Section 8772 Is A Valid Exercise Of Legislative Authority

On August 10, 2012, President Obama signed the Iran Threat Reduction and Syria Human Rights Act of 2012 into law. Pub. L. No. 112-158, 126 Stat. 1214. Part of continuing efforts by the United States to pressure Iran to comply with international obligations, the statute furthers the stated "goal of compelling Iran to abandon efforts to acquire a nuclear weapons capability and other threatening activities." 22 U.S.C. § 8711.

Section 502 of the Act (codified at 22 U.S.C. § 8772), at issue here, makes certain assets of Iran available for execution in a federal court. As petitioner acknowledges, § 8772 does this by "supersed[ing] all contrary laws, state and federal," and "[i]n their place, ... establish[ing] a new rule under which the assets at issue 'shall be subject to execution' if the court makes two findings." Pet. Br. 2 (quoting 22 U.S.C. § 8772(a)(1)); *see also id.* at 12 (§ 8772 "alters the governing rules, preempting state law and superseding other federal requirements"). More specifically (again in petitioner's words), § 8772 "overrides" the rules governing the attachment of the financial assets against which respondents seek to execute their judgments—here, Article 8 of the Uniform Commercial Code. *Id.* at 13. It also su-

persedes provisions of the Foreign Sovereign Immunities Act (FSIA), rendering them inapplicable to the present case. *Id.* at 12-13, 28; *see* 22 U.S.C. § 8772(a)(1) (imposing its rules "notwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law").

In enacting § 8772, Congress exercised legislative power. Congress enacted a "defined and binding rule" that altered the parties' rights and obligations. *Yakus*, 321 U.S. at 424; *see also INS* v. *Chadha*, 462 U.S. 919, 952 (1983). Establishing new legal rules for courts to apply—or, as here, replacing previously applicable legal rules with new rules—is precisely the role that the Constitution assigns to Congress and that the Court and the Executive Branch have long described as the province of the Legislative Branch. *E.g.*, *Plaut*, 514 U.S. at 218; *Seattle Audubon*, 503 U.S. at 438; *Buckley* v. *Valeo*, 424 U.S. 1, 139 (1976) ("Legislative power ... is the authority to make laws ...." (quotation marks omitted)); *Constitutionality of Congress' Disapproval of Agency Regulations by Resolutions Not Presented to the President*, 4 Op. O.L.C. 21, 24-25 (1980) (Congress's function is "to enact laws" and, if necessary, to engage in "the plenary legislative process of amendment and repeal"); *see also The Federalist* No. 33, at 204 (Hamilton) (Cooke ed., 1961) ("What is a legislative power, but a power of making laws?").

Nor does § 8772 transgress any of the limits the Court has recognized on Congress's authority with respect to Article III. *See supra* pp. 6-8. Section 8772 does not direct any particular interpretation of the law, findings of fact, or application of law to facts. *Seattle*

Audubon, 503 U.S. at 438.[3] It does not make any judicial decisions subject to review by Congress or the Executive Branch. *Hayburn's Case*, 2 U.S. at 410. And it does not reopen any final judgments. *Plaut*, 514 U.S. at 218-219. It simply amended the underlying law—which is Congress's constitutional prerogative.

B. Section 8772 Is Valid Even If The Consolidated Actions Here Are Treated As A Single Case

Petitioner does not actually dispute the constitutional analysis above. Rather, petitioner's principal objection is that § 8772 offends the separation of powers because, petitioner says, it applies to a single, known, pending "case." Pet. Br. 22. According to petitioner, the judicial power is that "of deciding particular cases," whereas the legislative power is that "of enacting general pronouncements of law." *Id.* at 23.

Though descriptively accurate in many instances, that dichotomy does not correctly define the line between Article I legislative power and Article III judicial power. As petitioner's language hints, there may also be occasion for *specific* pronouncements of law by Congress. Although other constitutional provisions or principles may constrain Congress's authority to enact a law governing a single pending case, Article I and the constitutional separation of powers do not. This conclu-

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[3] Congress explicitly left to the district court the determination of several predicate facts about the assets at issue, including (1) that they are "held in the United States," (2) that they are "blocked asset[s]" under U.S. law, (3) that "Iran holds equitable title to, or the beneficial interest in," them, and (4) "that no other person possesses a constitutionally protected interest in" them. 22 U.S.C. § 8772(a)(1)-(2). The district court made the requisite findings after the law's enactment. Pet. App. 63a-64a, 96a-101a.

sion is supported by sustained congressional practice dating back to the founding, by decisions of the Court throughout our Nation's history, by the Executive's affirmation, and by compelling practical considerations.

1. Petitioner is mistaken that § 8772 is "virtually unprecedented" in its specificity. Pet. Br. 18. Congress has enacted bills directed at specific individuals or cases throughout American history. This long practice is compelling evidence that legislative specificity alone does not give rise to a separation of powers problem. *See Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2091 (2015) ("In separation-of-powers cases this Court has often put significant weight upon historical practice." (quotation marks omitted)); *Mistretta* v. *United States*, 488 U.S. 361, 401 (1989) (noting, in separation of powers context, that "'traditional ways of conducting government ... give meaning' to the Constitution" (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring))).

From the earliest days of the Republic, Congress has regularly passed private bills, often to indemnify specific public officials who had been found liable in specific cases. *E.g.*, Pfander & Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1872-1878, 1888-1914 (2010). As the Court has recognized, "[p]rivate bills in Congress are still common, and were even more so in the days before establishment of the Claims Court." *Plaut*, 514 U.S. at 239 n.9.

Even apart from private bills, Congress has regularly enacted laws that govern a single or very small number of specific subjects. For example, two well-known cases from the nineteenth century involved fed-

eral laws singling out particular bridges as lawful. *See In re Clinton Bridge*, 77 U.S. (10 Wall.) 454, 462-463 (1870) (upholding act that declared a specific bridge, at issue in pending litigation, to be "a lawful structure"); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 430-432 (1856) (upholding act that determined a single bridge was "no longer an unlawful obstruction"). This practice was also common in the twentieth century. *E.g.*, Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, § 706, 116 Stat. 820, 864-869 (2002) (appropriations rider targeted at particular environmental settlement agreement); An Act to Expedite the Construction of the World War II Memorial in the District of Columbia, Pub. L. No. 107-11, 115 Stat. 19 (2001) (legislation targeted at challenges to planned memorial); An Act Making Appropriations for the Department of the Interior and Related Agencies for the Fiscal Year Ending September 30, 1990, and for Other Purposes, Pub. L. No. 101-121, § 318, 103 Stat. 701, 745-750 (1989) (legislation targeted at particular forests at issue in two pending cases); An Act to Amend the Indian Claims Commission Act of August 13, 1946, and for Other Purposes, Pub. L. No. 95-243, 92 Stat. 153 (1978) (legislation targeted at particular takings claim brought by Sioux Nation); Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, 88 Stat. 1695 (1974) (legislation targeted at former President Nixon's records); Act of Feb. 27, 1942, ch. 122, 56 Stat. 1122 (legislation targeted at single individual's claims against the government).

Indeed, as petitioner acknowledges, Congress passed a law quite similar in scope and effect to § 8772 in 2001, in order to abrogate Iran's sovereign immunity

in lawsuits arising out of the 1979 U.S. embassy hostage crisis. Pet. Br. 53. The plaintiffs in that case, former American hostages, had won a default judgment against Iran in August 2001. *Roeder* v. *Islamic Rep. of Iran*, 333 F.3d 228, 230 (D.C. Cir. 2003). The State Department intervened and moved to vacate the judgment, arguing that both the Algiers Accords and the FSIA barred the suit. *Id.* at 231. In November 2001, while that motion was pending, Congress passed an appropriations rider providing that a foreign state would not enjoy immunity for an act that was "related to Case Number 1:00CV03110 (ESG) in the United States District Court for the District of Columbia." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-77, § 626(c), 115 Stat. 748, 803 (2001). As here, that law applied only to a specific "case," identified by docket number. Nonetheless, the Office of Legal Counsel advised the White House that "[n]othing in the Constitution bar[red] Congress from enacting such legislation." *OLC Iran Op.*, 25 Op. O.L.C. at 285; *see id.* ("*Klein* does not ... prohibit Congress from *changing the underlying law* that governs in a pending case ....").[4]

The Court has repeatedly confirmed that a federal law is not invalid merely because it applies, in purpose or effect, to a single subject or a very small group of specific subjects. In *Plaut*, for example, the Court expressly rejected the argument advanced by petitioner here that Congress's legislative powers are limited to

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[4] The Court of Appeals for the D.C. Circuit, in *Roeder*, found it unnecessary to address the constitutionality of the legislation because it determined that the plaintiffs' claims were barred by the Algiers Accords. 333 F.3d at 237-238 & n.5.

the prescription of rules having general scope: "While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action. ... Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid ...." 514 U.S. at 239 n.9.

In addition, in *Chadha*, the Court held that a resolution by the U.S. House of Representatives purporting to veto the Attorney General's decision to suspend the deportation of six specifically identified individuals was "subject to the standards prescribed in" Article I because it was "clear that it was an exercise of legislative power." 462 U.S. at 926-928, 956-957. Although the Court "agree[d] that there is a sense in which [the resolution] has a judicial cast," the Court was "satisfied that the one-House veto is legislative" because it "had the purpose and effect of altering the legal rights, duties and relations of persons ... outside the legislative branch." *Id.* at 952, 957 n.22.

On other occasions too, this Court and lower courts have upheld as a valid exercise of Congress's legislative power laws that governed one or a very small number of specific subjects. *E.g.*, *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 406-407 (1980) (upholding act that required court to rehear particular claim brought by tribe under the Takings Clause); *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 471-472 (1977) (upholding act that applied to former President Nixon's records as legislation governing a "legitimate class of one"); *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 158-159 (1974) (upholding act that applied to specific railroads in a single region); *Pope* v. *United States*, 323 U.S. 1, 10-12 (1944) (upholding special act giving a contractor the right to recover additional compensation from the government); *Clinton Bridge*, 77 U.S. at 462-

463 (upholding act governing a single bridge); *Wheeling Bridge*, 59 U.S. at 430-432 (same); *Biodiversity Assocs.* v. *Cables*, 357 F.3d 1152, 1167-1168 (10th Cir. 2004) (upholding law that abrogated specific settlement agreement between U.S. Forest Service and environmental groups); *SeaRiver Mar. Fin. Holdings Inc.* v. *Mineta*, 309 F.3d 662, 669, 674-675 (9th Cir. 2002) (upholding law that effectively applied to a single oil tanker); *see also National Coal. to Save Our Mall* v. *Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001) (upholding law that applied to a single memorial and "find[ing] the level of specificity to be unobjectionable").

2. Nor is the scope of Congress's power to legislate diminished simply because the law's subject was also the subject of a pending lawsuit at the time of enactment. The Court's jurisprudence has been clear on this point since the early days of the Republic: when rendering judgments, courts must apply the law as they find it at the time of their decisions. *See, e.g.*, *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801); *see also Miller* v. *French*, 530 U.S. 327, 344 (2000). That principle is a corollary of the power of Congress, described above, to make and amend law for the Judicial Branch to apply. Thus, "if ... a law intervenes and positively changes the rule which governs, the law must be obeyed." *Schooner Peggy*, 5 U.S. at 110. More recently, in *Plaut*, this Court reaffirmed that "[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." 514 U.S. at 226-227.

It is therefore clear—as a matter of precedent as well as first principles—that Congress can legislate on a specific subject and with respect to pending cases.

When Congress does both at the same time, it does not cross a constitutional line. As the D.C. Circuit has held in similar circumstances, there is "no reason why the specificity [of the law] should suddenly become fatal merely because there happened to be a pending lawsuit." *National Coal.*, 269 F.3d at 1097; *cf. Plaut*, 514 U.S. at 238-239. Indeed, an amicus supporting petitioner has elsewhere correctly noted "the emptiness of the argument that legislation is invalid if too litigation-specific"; if it would be valid to enact a specific law prior to a lawsuit, the fact that a case was "pending, rather than anticipated," is of no constitutional significance. Wasserman, *The Irrepressible Myth of* Klein, 79 U. Cin. L. Rev. 53, 69 (2010).

3. There are sound reasons why Congress has the power to legislate narrowly, even to the point of a single subject, and even if a suit involving the subject is already pending.

First, as the Court has recognized, sometimes a problem exists only with respect to a very limited number of subjects, and Congress needs the corresponding power to provide tailored solutions. In *Nixon*, for example, the Court held that the Presidential Recordings and Materials Preservation Act "fairly and rationally" applied only to former President Nixon's papers—the law "refer[red]" to him "by name"—because he was the only former President who could have destroyed his papers. 433 U.S. at 471-472; *see also, e.g., Regional Rail*, 419 U.S. at 159 (Congress can "fashion legislation to resolve geographically isolated problems"); *SeaRiver*, 309 F.3d at 674-675 (Congress could legitimately conclude that a particular oil tanker posed a greater environmental risk).

More generally, the Court has observed: "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. ... Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical of Okla. Inc.*, 348 U.S. 483, 489 (1955); *see also Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656, 1668 (2015) ("A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns.").

Second, a rule that made the constitutionality of a statute turn on the number of pending cases it affected would be unworkable. As this case demonstrates, multiple participants in a single event may file their claims separately, or together, and later they may join their suits, or sever them. Indeed, respondents' "case" actually comprises more than 1,000 claims brought by "the representatives of hundreds of Americans killed in multiple Iran-sponsored terrorist attacks." Pet. App. 2a. These claims were asserted in at least eighteen different lawsuits and have now been consolidated into a single class action solely because "they are all seeking collection of judgments with regard to the same assets." *Id.* at 52a n.1.

Thus, petitioner's position raises unresolvable questions such as: Is this one case, eighteen cases, hundreds of cases, or more than a thousand cases? And how few cases can a congressional act govern before it transforms from "lawmaking" into "adjudicating"? Amici submit that there are no coherent and constitutionally meaningful answers to these questions. There is certainly no reason to conclude that the scope of

Congress's legislative power turns on whether people who would be affected by a law decided before the law was enacted to avail themselves of a procedural device designed to promote expedient litigation. As one court aptly put it, "it only 'prolongs doubt and multiplies confrontation' to make the constitutional analysis hinge on the murky distinction between generalized lawmaking and particularized application of the law." *Biodiversity Assocs.*, 357 F.3d at 1168 (quoting *Plaut*, 514 U.S. at 240).

4. That laws applying to a very narrow class of pending lawsuits do not offend the constitutional separation of powers is not to say that there are no constitutional constraints on Congress's power to legislate narrowly. Rather, the Constitution provides various safeguards that might apply to such legislation.

The Bill of Attainder Clause provides one obvious safeguard. *See Selective Serv. Sys.* v. *Minnesota Pub. Interest Research Group*, 468 U.S. 841, 847 (1984) (Bill of Attainder Clause protects against "singling out of an individual for legislatively prescribed punishment" (quotation marks omitted)); *Plaut*, 514 U.S. at 239 n.9; *Nixon*, 433 U.S. at 468-484; *National Coal.*, 269 F.3d at 1097. The Equal Protection Clause offers another. *See Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564 (2000) (per curiam) (a single individual can bring an Equal Protection challenge on behalf of a "class of one"); *Lee Optical*, 348 U.S. at 488-489; *National Coal.*, 269 F.3d at 1097. Still further protection might be afforded by the Takings Clause in appropriate cases. *See Yee* v. *City of Escondido*, 503 U.S. 519, 522-523 (1992) (Takings Clause requires just compensation where "regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole").

In fact, as the Court has observed, the very presence of these safeguards confirms that Congress may legislate narrowly: "Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid—or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause, including cases which say that it requires not merely 'singling out' but also punishment ...." *Plaut*, 514 U.S. at 239 n.9 (emphasis omitted).

C. Section 8772 Is Valid Even If It Effectively Resolves This Case

Seizing on the remark in *Klein* that Congress cannot "prescribe rules of decision" in cases pending before the courts, 80 U.S. at 146, petitioner also objects to § 8772 because it in effect dictates the outcome of the pending proceeding. Petitioner misapprehends the Court's opinion in *Klein*. Even if § 8772 leaves no doubt as to the disposition of the case, it is still consistent with the separation of powers.

1. *Klein* does not apply when Congress amends the underlying law

"Whatever the precise scope of *Klein*, ... its prohibition does not take hold when Congress 'amend[s] applicable law.'" *Plaut*, 514 U.S. at 218 (quoting *Seattle Audubon*, 503 U.S. at 441). Because, as discussed above, § 8772 operates by amending the law governing attachment of assets and foreign sovereign immunity, the principle articulated in *Klein* does not bear on this case.

Resisting the Court's reading of its own precedent, petitioner argues that whatever the precise scope of *Klein*, its prohibition does take hold when "a statute ... compels the outcome in a case," Pet. Br. 48-50, which,

petitioner says, § 8772 does by making the availability of the assets in question turn on facts that were "foregone conclusions" at the time § 8772 was enacted, *id.* at 47.

Even if the outcome of this litigation was foreordained upon enactment, however, that would not undermine the validity of § 8772 under *Klein*.[5] As explained above, whenever Congress amends the law, the courts will presumptively apply that new law to cases pending at the time of enactment. *E.g.*, *Plaut*, 514 U.S. at 226-227. In some cases, the relevant facts will be uncontested, undeniable, or already established by the factfinder. Yet in those cases, the role of the court to apply the law to the facts and render a binding final judgment remains undiminished, no matter how obvious the result may seem. As the Court has made clear, "[i]t is [still] a judicial function and an exercise of the judicial power to render judgment on consent," as well as to "give judgment on a legal obligation which the court finds to be established by stipulated facts." *Pope*, 323 U.S. at 12; *see also* Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 Mercer L. Rev. 697, 718 (1995) (Congress often "effectively dictate[s] the result in individual cases" when it amends law).

This point becomes even clearer when one considers Congress's well-settled authority to repeal a cause

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[5] Amici take no position on whether the predicate facts were a foregone conclusion at the time of § 8772's enactment. The district court, however, disagreed with petitioner on this point, saying, "[t]here is frankly plenty for this Court to adjudicate," including "whether the Blocked Assets were owned by Iran, or [whether] [other parties] have some form of beneficial or equitable interest." Pet. App. 115a.

of action or to provide particular defendants with immunity. *See, e.g.*, *Dennis* v. *Higgins*, 498 U.S. 439, 450 (1991) ("federal statutory rights" can be "altered or eliminated by Congress"). There is no doubt that a legislative amendment repealing a cause of action or setting up an immunity is a valid exercise of Congress's legislative power (at least as a separation of powers matter), even if its effect is to terminate a legal claim pending at the time of enactment.

A recent decision by the Court of Appeals for the Ninth Circuit confirms that conclusion. Following the public disclosure of the government's warrantless wiretapping program in 2005, numerous plaintiffs sued major telecommunications carriers over their participation in the program. *In re NSA Telecomms. Records Litig.* ("*NSA Records*"), 671 F.3d 881, 890-891 (9th Cir. 2011). While the lawsuits were pending—and "partially in response" to them—Congress enacted a law providing that no action could be maintained against any person for assisting the program. *Id.* at 891 (citing Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, § 802, 122 Stat. 2436, 2468-2470 (2008) (codified at 50 U.S.C. § 1885a)). The law expressly applied to all actions pending on the date of enactment. 50 U.S.C. § 1885a(i). It was therefore effectively dispositive of those actions, as Congress intended. *NSA Records*, 671 F.3d at 893. Yet the court of appeals upheld the law against various separation of powers challenges—among them, the claim that the statute effected a "legislative incursion upon the judicial branch." *See id.* at 894-899. Other courts of appeals have reached similar results in related circumstances. *See Ileto* v. *Glock, Inc.*, 565 F.3d 1126, 1139-1140 (9th Cir. 2009) (rejecting *Klein* challenge to federal statute requiring courts to dismiss certain pending civil actions

against firearms suppliers because statute amended the relevant law); *City of N.Y.* v. *Beretta U.S.A. Corp.*, 524 F.3d 384, 395-396 (2d Cir. 2008) (same).

Those decisions reflect that no separation of powers principle requires Congress to be surprised by the application of the laws it enacts. Because § 8772 merely amends existing laws, it is valid under *Klein* regardless of whether the predicate facts upon which its application depends were predetermined and the eventual outcome of the case was known to Congress when it passed the law.

2. The unique considerations in *Klein* are absent here

In any event, petitioner misstates *Klein*'s holding. The decision arose from a rare—perhaps unique—situation in which Congress attempted to manipulate the jurisdiction and functioning of the Judicial Branch to accomplish a constitutionally impermissible end.

During the Civil War, Congress enacted a law allowing the government to seize property held by persons aiding the rebellion. Abandoned and Captured Property Act, ch. 120, 12 Stat. 820 (1863). However, an owner could recover seized property if he could prove that he "had never given aid or comfort" to the Confederacy. *Klein*, 80 U.S. at 139. After President Lincoln issued a proclamation pardoning all persons who "t[ook] and subscribe[d] a prescribed oath of allegiance" to the United States, *id.* at 132, this Court was asked to determine whether the executive pardon entitled a property owner to recover seized property. The Court then held that the pardon controlled. *See United States* v. *Padelford*, 76 U.S. (9 Wall.) 531, 542-543 (1870). Con-

gress, in the midst of Reconstruction, responded to *Padelford* by enacting the law at issue in *Klein*.

That law contained several (often overlapping) provisions. First, no pardon would be admissible in the Court of Claims to establish a claimant's right to recover property. *Klein*, 80 U.S. at 143. Second, if a pardon had already been admitted as evidence, no court could consider it. *Id.* Third, loyalty had to be proved "according to the provisions of certain statutes, irrespective of the effect of any executive proclamation [or] pardon." *Id.* Fourth, if judgment had already been entered on other proof of loyalty (for example, a pardon), the Supreme Court's jurisdiction would cease and it would have to dismiss the case. *Id.* Fifth, any pardon for supporting the rebellion that was not accompanied by an express disclaimer of disloyalty would be "deemed" in the courts "conclusive evidence" of disloyalty. *Id.* at 143-144. Finally, on proof of such a pardon, the court's jurisdiction would cease and the case would be dismissed. *Id.* at 144.

The Court held in *Klein* that the new law was unconstitutional because it directly "impair[ed] the effect of a pardon, and thus infring[ed] the constitutional power of the Executive," to whom the Constitution "intrust[s]" the pardon power "alone." 80 U.S. at 147. "[I]t is clear," the Court explained, "that the legislature cannot change the effect of such a pardon any more than the executive can change a law." *Id.* at 148. As an attempt to do exactly that, the law impermissibly "impair[ed] the executive authority." *Id.*[6]

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[6] The Executive Branch has long focused on this aspect of *Klein*'s reasoning. *E.g.*, *Constitutionality of the Federal Advisory Committee Act*, 1 Op. O.L.C. Supp. 502, 505 (1974) (recognizing that *Klein* struck down a law "which tended to undercut the effect

There was, however, a second separation of powers problem with the law. Lacking the constitutional authority to "change the effect of ... a pardon," Congress infringed on the judicial power by "direct[ing] the court to be instrumental to that [impermissible] end." *Klein*, 80 U.S. at 148. The law accomplished that result not by amending the law so that when the courts independently applied it in pending cases, they reached a different result from the one they would have reached under the old law. Rather, the law sought to aggrandize for Congress the courts' role of interpreting and applying law and to manipulate the courts' jurisdiction to ensure that the courts entered judgments on the merits only when favorable to Congress's position, which was to undermine the President's valid use of the pardon power.

For example, the Court in *Klein* criticized the law's "great and controlling purpose" of "deny[ing] to pardons granted by the President *the effect which this court had adjudged them to have*." 80 U.S. at 145 (emphasis added). Thus, problematically, Congress had told the Court how to interpret not a statute but an act by the President pursuant to his exclusive constitutional power (the pardon), and further, to do so in a way that was contrary to how the Court had already decid-

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of presidential pardons as [an] unconstitutional infringement[] on executive powers") (opinion by then-Assistant Attorney General Scalia); *see also Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act*, 33 Op. O.L.C. 1, 29 (2009) (same); *Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. O.L.C. 253, 266 n.38, 267 n.40 (1996) (same); *Section 609 of the FY 1996 Omnibus Appropriations Act*, 20 Op. O.L.C. 189, 196 n.16 (1996) (same); *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182, 188 n.7 (1996) (same).

ed to interpret it. *Id.* at 148 (stressing that the law "required [the Court] to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their *legal effect*" (emphasis added)). Put another way, Congress was attempting to usurp the courts' power and duty to "say what the law is." *Marbury*, 5 U.S. at 177.

The Court also criticized Congress's patent manipulation of the courts' jurisdiction. Petitioner maintains that the Court in *Klein* objected that the law at issue "dictate[d] the outcome of pending cases" by "prescrib[ing] rules of decision." Pet. Br. 19. But that overlooks a critical aspect of the relevant passage: the Court was objecting that "*the denial of jurisdiction*" by the challenged law was "founded solely on the application of a rule of decision" in pending cases. *Klein*, 80 U.S. at 146 (emphasis added). What the Court meant was that instead of simply eliminating the courts' jurisdiction to hear suits like Klein's—which Congress had authority to do—the law at issue preserved that jurisdiction but then directed the courts to dismiss for lack of jurisdiction if they would otherwise reach a judgment on the merits that was adverse to the United States or had accepted proof that would presumably lead to such a judgment. *Id.* ("The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.").

In the Court's view, the law's manipulation of jurisdiction amounted to a congressional effort to dictate the *judgment* the courts would render rather than the law they would apply to reach a judgment. *E.g.*, *Klein*, 80 U.S. at 145 ("[T]he language of the proviso shows plainly that it does not intend to withhold appellate ju-

risdiction except as a means to an end."); *id.* at 146 ("It seems to us that this is not the exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power."). The Court found this an impermissible incursion upon the Judiciary: "Can [Congress] prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself." *Id.* at 147; *see also Sioux Nation*, 448 U.S. at 405 (noting "of obvious importance to the *Klein* holding was the fact that Congress was attempting to decide the controversy at issue in the Government's own favor").

In short, the law at issue in *Klein* did not simply prescribe a standard (dispositive or otherwise) for the court to apply in pending cases. It instructed the courts to adopt Congress's interpretation of the legal effect of a constitutional action by the President, which was contrary to the interpretation that the Court had already adopted; it manipulated jurisdiction to ensure that the courts entered a judgment favorable to the United States (dismissal) if they would otherwise have ruled for the claimant; and it did all of this to defeat the President's exercise of his exclusive constitutional pardon power. Section 8772, in contrast, shares none of these features and is therefore permitted by *Klein*.

D. Section 8772's Constitutionality Is Reinforced By The Political Branches' Power To Regulate Foreign Affairs

Finally, § 8772 is constitutional for an additional reason: it governs execution against a foreign state's property in satisfaction of a terrorism judgment against

the state. The political branches' authority to carry out the Nation's foreign affairs provides a strong basis for not reading *Klein* or other decisions so broadly as to fetter their ability to adjust the remedies available in a suit (such as this) against a foreign sovereign with substantial foreign affairs implications.

The Constitution "confide[s]" the regulation of foreign affairs to "the political departments of the government, Executive and Legislative." *Chicago & S. Air Lines*, 333 U.S. at 111; *see Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011*, 35 Op. O.L.C. __, 3-4 (Sept. 19, 2011). Yet occasionally "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493 (1983).

Various devices have been developed to ensure that courts respect the constitutional allocation of power over foreign affairs in such cases. One is the political question doctrine, which precludes the judiciary from deciding a claim if doing so would call upon the court to "supplant a foreign policy decision of the political branches with the courts' own unmoored determination." *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1427 (2012). Another safeguard is Congress's "undisputed power to decide ... whether and under what circumstances foreign nations should be amenable to suit in the United States." *Verlinden*, 461 U.S. at 493. Issues of foreign sovereign immunity are "rather questions of policy than of law" and are "for diplomatic, rather than legal discussion." *Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 146 (1812). Accordingly, prior to enactment of the FSIA, courts adhered assiduously to

the political branches' determinations of when a foreign sovereign should be immune from suit: the Judiciary should neither "deny ... immunit[ies]" that Congress and the President have "seen fit to allow," nor "allow ... immunit[ies] on new grounds" that the political branches have "not seen fit to recognize." *Republic of Mex.* v. *Hoffman*, 324 U.S. 30, 35 (1945); *see also Possible Participation by the United States in* Islamic Republic of Iran v. Pahlavi, 4 Op. O.L.C. 160, 163 (1980) (recognizing "long history of deference by courts to executive foreign policy determinations" regarding foreign sovereign immunity).

The law at issue here embodies just such a policy decision. The Iran Threat Reduction and Syria Human Rights Act of 2012 establishes "a comprehensive policy"—"consistent with" the Executive's policy position—to achieve "the goal of compelling Iran to abandon efforts to acquire a nuclear weapons capability and other threatening activities." 22 U.S.C. § 8711. Section 8772 furthers that foreign affairs goal by making certain financial assets that the government of Iran holds in the United States available for attachment and execution. In other words, by enacting § 8772 and amending the FSIA, the political branches have "not seen fit to recognize" immunity from execution or attachment for the Iranian assets at issue here, and the courts should respect that decision.

That the political branches made this determination with respect to specific assets at issue in a pending lawsuit does not diminish the validity of their determination. To regulate foreign affairs effectively, the political branches must be able to act narrowly, flexibly, and promptly. Thus, many decisions regarding foreign affairs must be made on a case-by-case basis, even if that means altering the immunity rules for a specific pend-

ing lawsuit. Historically, that is precisely how foreign sovereign immunity determinations were made. *E.g.*, *Republic of Austria* v. *Altmann*, 541 U.S. 677, 687 (2004) (noting the pre-FSIA policy of "deferring to case-by-case immunity determinations by the State Department"). Indeed, even since enacting the FSIA, Congress has made immunity determinations limited to a single pending case. *See, e.g.*, *OLC Iran Op.*, 25 Op. O.L.C. at 284 (concluding statutory provision removing Iran's foreign immunity in pending hostages litigation did not raise constitutional concerns under *Plaut* or *Klein*); *see also Congressional Authority to Modify an Executive Agreement Settling Claims Against Iran*, 4 Op. O.L.C. 289, 290 (1980) (concluding there would be "no legal impediment" if Congress decided to amend the FSIA to abrogate Iran's sovereign immunity in tort claims arising out of hostage crisis).

In short, whatever their application in ordinary cases, *Klein* and other decisions articulating principles for respecting the separation of powers between the Legislative and Judicial Branches should not be read to prohibit legislation defining the availability of immunity to a foreign sovereign or the availability of its assets to satisfy a judgment against it, even if limited to an identified pending case (or series of related cases). Because that is all that § 8772 does, it does not violate the constitutional separation of powers.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In the
Supreme Court of the United States

BANK MARKAZI, THE CENTRAL BANK OF IRAN

Petitioner,

v.

DEBORAH D. PETERSON, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICUS CURIAE* FOUNDATION FOR DEFENSE OF DEMOCRACIES IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Section 8772 Is Part Of A Comprehensive Effort To Use Economic Sanctions To Punish And Deter Iran's Sponsorship Of Terrorism 4

II. Section 8772 Implicates None Of The Separation Of Powers Concerns On Which Petitioner Relies 9

III. Section 8772 Does Not Violate Any Separation Of Powers Principle 17

A. Section 8772 Does Not Run Afoul of the Separation of Powers Principles Set Forth in *Klein* 18

B. Article III Does Not Prohibit Congress From "Effectively Dictating" the Outcome of Cases 21

C. Article III Does Not Require Laws to be Generally Applicable 24

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Acosta v. Islamic Republic of Iran,
No. 06-cv-745 (D.D.C.) 10

Arnold v. Islamic Republic of Iran,
No. 06-cv-516 (D.D.C.) 10

Beer v. Islamic Republic of Iran,
Nos. 06-cv-473 and 08-cv-1807 (D.D.C) 10

Bonk v. Islamic Republic of Iran,
No. 08-cv-1273 (D.D.C) 10

Bruner v. United States,
343 U.S. 112 (1952) 21

Clinton v. Jones,
520 U.S. 681 (1997) 26

Cort v. Ash,
422 U.S. 66 (1975) 21

Dames & Moore v. Regan,
453 U.S. 654 (1981) 5

Estate of Bland v. Islamic Republic of Iran,
No. 05-cv-2124 (D.D.C) 10

Estate of Brown v. Islamic Republic of Iran,
No. 08-cv-531 (D.D.C.) 10

Estate of Heiser v. Islamic Republic of Iran,
Nos. 00-cv-2329 and 01-cv-2104 (D.D.C) 10

Estate of Silvia v. Islamic Republic of Iran,
No. 06-cv-750 (D.D.C.) 10

Ex parte McCardle,
74 U.S. 506 (1869) 22

F.S. Royster Guano Co. v. Virginia,
253 U.S. 412 (1920) 26

Greenbaum v. Islamic Republic of Iran,
No. 02-cv-2148 (D.D.C.) 10

Khaliq v. Republic of Sudan,
No. 10-cv-356 (D.D.C.) 10

Kirschenbaum. v. Islamic Republic of Iran,
Nos. 03-cv-1708 and 08-cv-1814 (D.D.C) 10

Levin v. Islamic Republic of Iran,
No. 05-cv-2494 (D.D.C.) 10

Miller v. French,
530 U.S. 327 (2000) 19, 26

Murphy v. Islamic Republic of Iran,
No. 06-cv-596 (D.D.C.) 10

Mwila v. Islamic Republic of Iran,
No. 08-cv-1377 (D.D.C.) 10

Nat'l Coal. to Save Our Mall v. Norton,
269 F.3d 1092 (D.C. Cir. 2001) 25

Nixon v. Adm'r of Gen. Servs.,
433 U.S. 425 (1977) 24, 25

Owens v. Republic of Sudan,
No. 01-cv-2244 (D.D.C.) 10

Pennsylvania
v. Wheeling & Belmont Bridge Co.,
59 U.S. (18 How.) 421 (1855) 12, 24

Peterson v. Islamic Republic of Iran,
Nos. 01-cv-2094 and 01-cv-2684 (D.D.C.) 10

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995) ..... *passim*

Pope v. United States,
323 U.S. 1 (1944) 24

Robertson v. Seattle Audubon Soc'y,
503 U.S. 429 (1992) 12, 19, 21, 24

Rubin v. Islamic Republic of Iran,
No. 01-cv-1655 (D.D.C.) 10

Shawnee Tribe v. United States,
423 F.3d 1204 (10th Cir. 2005) 24

States v. Schooner,
5 U.S. (1 Cranch) 103 (1801) 21

Touby v. United States,
500 U.S. 160 (1991) 26

United States v. Klein,
80 U.S. (13 Wall.) 128 (1872) 18

United States v. Sioux Nation of Indians,
448 U.S. 371 (1980) 24

Valore v. Islamic Republic of Iran,
No. 03-cv-1959 (D.D.C) 10

Wultz v. Islamic Republic of Iran,
No. 08-cv-1460 (D.D.C.) 10

Statutes

22 U.S.C. §8772 ..... *passim*

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Pub. L. No. 109-3, 119 Stat. 15 (2005) 16

Pub. L. No. 111-195, 124 Stat. 1312 (2010) 6

Pub. L. No. 112-158, 126 Stat. 1214 (2012) 7, 23

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Priv. L. No. 109-1 (2006) 25

Priv. L. No. 112-1 (2012) 25

Transcript of Oral Argument, *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992) (No. 90-1596) 22

STATEMENT OF INTEREST[1]

The Foundation for Defense of Democracies ("FDD") is a non-profit, non-partisan section 501(c)(3) policy institute focusing on foreign policy and national security. Through its Iran Project and its Center on Sanctions and Illicit Finance, FDD conducts extensive research on ways to use sanctions to target the economic and financial resources of the Iranian regime. FDD's work has informed numerous pieces of Iran sanctions legislation, including the Iran Freedom and Counter-Proliferation Act of 2012; the Iran Threat Reduction and Syria Human Rights Act of 2012; section 1245 of the National Defense Authorization Act of 2012; and the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010. These laws target Iran's energy, financial, shipping, insurance, commercial, and proliferation activities, as well as the regime's human rights abuses. The legislative measures are widely viewed as the most robust U.S. measures yet imposed against the Iranian regime.

FDD also seeks to reduce the amount of oil and other commercial revenues the Iranian regime can devote to advancing its illicit nuclear and ballistic missile programs, supporting terrorism, and repressing its citizens. As part of this effort, FDD has

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

performed studies on sanctioning Iran's Central Bank, Iranian banks, and the Islamic Revolutionary Guard Corps, and has sought to deny the Islamic Republic the ability to use the international Society for Worldwide Interbank Financial Telecommunications ("SWIFT") to conduct financial transactions.

FDD has a significant interest in this case because it provided research, analysis, and expertise to Congress regarding the Iran Threat Reduction and Syria Human Rights Act of 2012, section 502 of which (codified at 22 U.S.C. §8772) is being challenged in this case. In particular, FDD provided extensive research and championed measures in the Act dealing with energy, shipping, banking, insurance, nonproliferation, and human rights abuses. FDD firmly believes that Congress and the President must remain unfettered in their efforts to hold Iran accountable for sponsoring acts of terrorism against U.S. citizens around the world, and that Iran should not be permitted to use the international banking system to shield its assets from terrorism-related judgments. Section 502 of the Act is instrumental to those efforts.

SUMMARY OF ARGUMENT

This case is not about "a statute that effectively directs a particular result in a single pending case." Pet'r.Br.i. Nor is it about an effort by Congress "to ensure that its favored litigant prevails." *Id.* at 2. Instead, it is about a statute that serves as a critical tool in the United States' sustained efforts to use economic sanctions to punish Iran for, and deter it from, supporting acts of terrorism against U.S. citizens. Consistent with that broader foreign policy

objective, the statute is not confined to any particular litigant or to any particular claim. Nor does the statute direct a federal court to order one party to turn over money to another. Instead, the statute just establishes the law that a court should apply when determining whether a particular set of assets is subject to execution and attachment for judgments against Iran, and then tasks a court with applying it. The findings that the statute tasks the court with making are no mere make-weights; nor are they fig leafs for congressional incursion on Article III prerogative. Instead, they are precisely what ensures that execution or attachment will be permitted only when it will further both of the policy goals underlying the law: facilitating efforts by the victims of Iran's deplorable actions to collect on the judgments they have obtained, and ensuring that Iran itself is held responsible for the injuries it has caused.

Petitioner's blithe suggestion that "[i]f Congress wanted to compensate these plaintiffs," it could have just paid their claims itself, Pet'r.Br.53, ignores what section 8772 is really about. To be sure, section 8772 is intended to ensure that the representatives of the hundreds of the victims who lost their lives to Iran's state-sponsored terrorism will actually be compensated for the wrongs that they have suffered. But equally important, it is also about achieving the United States' broader foreign policy objective of using economic sanctions to ensure that *Iran itself* is held responsible for the deplorable acts of terrorism that it sponsors, and meaningfully deterred from continuing to do the same. And the statute is carefully crafted to leave fully intact a court's Article III prerogative to determine whether the legal conditions Congress has

crafted to further those twin policy goals are actually satisfied. The statute thus simply does not implicate any of the separation of powers principles on which petitioner seeks to rely. In short, it is Iran, not section 8772, that is a threat to our democracy.

ARGUMENT

I. Section 8772 Is Part Of A Comprehensive Effort To Use Economic Sanctions To Punish And Deter Iran's Sponsorship Of Terrorism.

Section 8772 and the comprehensive 56-page piece of legislation through which it was enacted are part of a sustained effort to use targeted economic sanctions to punish and deter Iran's sponsorship of terrorism. Since the Iran Hostage Crisis in 1979, Iran has posed a continuous and uninterrupted threat to American interests and American lives. Iran-sponsored bombings, assassinations, hijackings, and hostage-takings over the past 36 years have claimed thousands of victims, and future acts threaten to claim thousands more. This pervasive Iranian threat is virtually without parallel in the modern era, in terms of both its longevity and its intensity American foreign policymakers have accordingly used every means of national power and leverage at their disposal to ensure that Iran is held accountable for, and deterred from, harming U.S. citizens.

From the beginning, economic sanctions have been a critical tool in the United States' foreign policy toward Iran. *See* Kenneth Katzman, Cong. Research Serv., RS 20871, *Iran Sanctions* 1 (2015) ("Katzman"). During the Iran Hostage Crisis, President Carter declared a national emergency and blocked billions of dollars of Iranian assets held in the United States. *See*

Dames & Moore v. Regan, 453 U.S. 654, 662-63 (1981). Although most of those sanctions were lifted upon resolution of the crisis in 1981, the United States officially designated Iran a state sponsor of terrorism following the October 1983 bombing of United States Marine barracks in Lebanon. That designation triggered substantial sanctions under the Export Administration Act of 1979, including restrictions on foreign assistance, a ban on arms transfers, and export controls for dual-use items. *See* Katzman 2-3.

In the mid-1990s, President Clinton and Congress continued efforts to deny Iran financial resources to support terrorism. President Clinton issued several executive orders with respect to Iran, including bans on United States investment in Iran's energy sector and bans on United States trade with Iran. *See* Exec. Order No. 12,957, 60 Fed. Reg. 14,615 (1995); Exec. Order No. 12,959, 60 Fed. Reg. 24,757 (1995). In 1996, Congress went one step further with the Iran and Libya Sanctions Act ("ILSA"), Pub. L. No. 104-172, 110 Stat. 1541 (1996), which sought to deprive Iran of foreign investment in its energy sector. The ILSA mandated sanctions on foreign entities or persons investing more than $20 million in Iran's energy sector. *See* Katzman 8-11.

Beginning in 2006, the Bush administration and then the Obama administration, with bipartisan support from Congress, designed a new and unprecedented campaign of economic pressure on Iran. These efforts began with the Department of the Treasury, which worked to persuade banks around the world to cease all business with Iran and isolate Iran from the international financial system. To ensure

that Iran could not get around those constraints by funneling its assets through third parties, President Bush issued two executive orders that blocked the assets of individual Iranian banks and other entities that Iran has used to facilitate its sponsorship of terrorism. *See* Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (2001); Exec. Order No. 13,382, 70 Fed. Reg. 38,567 (2005). The State Department also engaged with the United Nations Security Council, which passed four sanctions resolutions against Iran between 2006 and 2010. Katzman 31-32. These resolutions froze the assets of named Iranian individuals and entities, prohibited Iran from a wide range of weapons-related activity, prohibited certain exports to Iran, and called for restraints on transactions with Iranian banks. *Id.* at 32.

Congress has supported these efforts with legislation increasing the economic pressure to deter and prevent Iran from sponsoring terrorism. Between 2010 and 2013, congressional sanctions targeted Iran's financial, energy, shipping, automotive, petrochemical, insurance, precious metals, and industrial trade industries. These efforts cut off Iran's economic and financial lifelines, including its crude oil exports, the Central Bank of Iran's access to the global financial system, and the use of the SWIFT global financial messaging system. First, in 2010, Congress codified the ban on United States trade with Iran in the Comprehensive Iran Sanctions, Accountability, and Divestment Act ("CISADA"), Pub. L. No. 111-195, 124 Stat. 1312 (2010). CISADA also directs the President to impose sanctions on persons who invest in Iran's energy sector, on foreign banks that knowingly facilitate certain Iranian transactions, and

on individuals complicit in human rights abuses. In 2011, Congress passed legislation aimed at weakening Iran's oil industry by imposing consequences on foreign banks that process any payments through Iran's central bank. *See* National Defense Authorization Act ("NDAA"), Pub. L. No. 112-81, 125 Stat. 1298 (2011).

The Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214, is a continuation of these legislative efforts. The Act aims to compel Iran to abandon its pursuit of nuclear weapons, to deter Iran from sponsoring acts of terror, and to punish Iran for its past sponsorship of terrorism. Various provisions of the Act blacklist Iran's energy. financial, and transportation sectors, cut off companies that do business with Iran from access to domestic markets, impose sanctions to prevent Iran from repatriating any proceeds from its oil sales, and deprive the Iranian regime of 80 percent of its hard currency earnings and half the funds that support its budget. Section 8772, the provision at issue in this case, is but one of the Act's many efforts to increase the financial pressure on Iran to cease sponsoring acts of terrorism. "[I]n furtherance of the broader goals of th[e] Act to sanction Iran," section 8772 ensures that Iran will not be able to escape the financial consequences of its actions, or the deterrence that those consequences are intended to accomplish, by using third parties to conceal and/or shield its assets from the many victims of terrorism whose duly obtained judgments Iran has refused to pay.

To that end, section 8772 identifies nearly $2 billion in Iranian assets held at a U.S. bank and

subjects those assets to execution to satisfy judgments arising out of Iran's sponsorship of terrorism so long as certain statutorily specified criteria are satisfied. In particular, because section 8772 is intended not just to compensate victims, but also "to ensure that *Iran* is held accountable for paying the judgments" that result from its support of terrorism, the provision applies only if the court determines that "Iran holds equitable title to, or the beneficial interest in, the assets ... and that no other person possesses a constitutionally protected interest in the assets." 22 U.S.C. §8772(a)(2) (emphasis added). If the court finds that someone else holds a "beneficial" or "a constitutionally protected interest in the assets," it may make the assets available for execution or attachment only to the extent that doing so "does not infringe upon" that third-party interest. *Id.* §8772(a)(2)(B).

While the statute identifies the relevant assets by reference to the docket number of ongoing proceedings in the Southern District of New York, it does not single out any particular judgment or judgments that they may be used to satisfy. Instead, so long as the conditions that the statute identifies are satisfied, the assets may be used "to satisfy *any* judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, or hostage-taking, or the provision of material support or resources for such an act." *Id.* §8772(a)(1)(C) (emphasis added). Accordingly, although section 8772 applies only to one particular proceeding, its application is not confined to the parties who were already part of that proceeding when the statute was enacted. Section 8772 instead leaves

other victims of Iran's sponsorship of terrorism free to intervene in the proceeding and assert their own claims to the assets, which some did after the statute took effect. *See* Pet.App.18a-19a.

The provisions of section 8772 thus work in tandem to achieve Congress' two basic objectives. First, in furtherance of its goal of holding Iran responsible for the acts of terrorism that it has sponsored, the statute renders the assets subject to attachment only to the extent that they are, in fact, Iran's assets. Second, in further of its goal of ensuring that *all* victims of Iran's acts have the potential to execute on the judgments they have obtained, the Act renders the assets subject to execution or attachment by *any* victim with a claim against the assets, not just some preferred individual or individuals. The statute requires only that everyone falling into that class litigate their claims in a single consolidated proceeding.

II. Section 8772 Implicates None Of The Separation Of Powers Concerns On Which Petitioner Relies.

When section 8772 is viewed against that backdrop, three things are crystal clear. First, the statute is not directed at "a single pending case." Pet'r.Br.1. It is instead directed at an entire class of cases that Congress just decided to effectively consolidate into a single proceeding. Second, section 8772 does not direct the district court to reach any particular outcome; it instead requires the court to make findings essential to ensuring that the statute furthers not only Congress' interest in compensating the victims of acts of terrorism sponsored by Iran, but

also its equally important objective of holding *Iran* responsible for its deplorable actions. Third, section 8772 is nothing like the kinds of one-off laws to which petitioner analogizes. It reflects not congressional interference in a private dispute, but rather a critical component of a much broader foreign policy initiative.

1. First, the notion that section 8772 applies only to "a single pending case" blinks reality. Respondents are the representatives of hundreds of Americans killed in several different Iran-sponsored terrorist attacks, who among them hold judgments from well over a dozen different civil actions.[2] The terrorist

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[2] Those civil actions are: *Peterson v. Islamic Republic of Iran*, Nos. 01-cv-2094 and 01-cv-2684 (D.D.C.); *Greenbaum v. Islamic Republic of Iran*, No. 02-cv-2148 (D.D.C.); *Acosta v. Islamic Republic of Iran*, No. 06-cv-745 (D.D.C.); *Rubin v. Islamic Republic of Iran*, No. 01-cv-1655 (D.D.C.); *Estate of Heiser v. Islamic Republic of Iran*, Nos. 00-cv-2329 and 01-cv-2104 (D.D.C); *Levin v. Islamic Republic of Iran*, No. 05-cv-2494 (D.D.C.); *Valore v. Islamic Republic of Iran*, No. 03-cv-1959 (D.D.C); *Bonk v. Islamic Republic of Iran*, No. 08-cv-1273 (D.D.C); *Estate of Silvia v. Islamic Republic of Iran*, No. 06-cv-750 (D.D.C.); *Estate of Brown v. Islamic Republic of Iran*, No. 08-cv-531 (D.D.C.); *Estate of Bland v. Islamic Republic of Iran*, No. 05-cv-2124 (D.D.C); *Beer v. Islamic Republic of Iran*, Nos. 06-cv-473 and 08-cv-1807 (D.D.C); *Kirschenbaum. v. Islamic Republic of Iran*, Nos. 03-cv-1708 and 08-cv-1814 (D.D.C); *Arnold v. Islamic Republic of Iran*, No. 06-cv-516 (D.D.C.); *Murphy v. Islamic Republic of Iran*, No. 06-cv-596 (D.D.C.); and *Wultz v. Islamic Republic of Iran*, No. 08-cv-1460 (D.D.C.). Three other plaintiff groups previously were involved in these proceedings, but the district court denied them turnover because they did not yet hold judgments against Iran. *See* Pet.App.19a-20a, 28a. Those civil actions are: *Mwila v. Islamic Republic of Iran*, No. 08-cv-1377 (D.D.C.); *Owens v. Republic of Sudan*, No. 01-cv-2244 (D.D.C.); and *Khaliq v. Republic of Sudan*, No. 10-cv-356 (D.D.C.).

attacks giving rise to these judgments include the 1983 Beirut Marine Barracks Bombing, the 1983 kidnapping of CNN correspondent Jerry Levin, the 1990 assassination of Rabbi Meir Kahane, the 1996 bombing of the Khobar Towers in Saudi Arabia, a September 4, 1997 suicide bombing at a street mall in Jerusalem, an August 9, 2001 suicide bombing at a restaurant in Jerusalem, a December 1, 2001 suicide bombing at a street mall in Jerusalem, a June 11, 2003 suicide bombing on a bus in Jerusalem, and an April 17, 2006 suicide bombing at a restaurant in Tel Aviv.

To be sure, the plaintiffs who obtained judgments in those different cases are now all part of a single proceeding to collect on them. But that is not because their discrete cases are all really one and the same. It is because section 8772 effectively directed everyone who falls into the class of cases to which the law applies—namely, cases in which a victim of Iran's state-sponsored terrorism has obtained a judgment on which he or she is seeking to collect—to go litigate their efforts to execute on the relevant assets in that consolidated proceeding. By declaring section 8772 inapplicable to "any proceedings other than proceedings referred to in subsection (b)," Congress thus did not "change[] the law for a single case." Pet'r.Br.40. Instead, it simply established a single procedural vehicle through which all of the cases to which section 8772 applies could be resolved at once.

That alone cannot be the difference between a constitutional law and an unconstitutional one. If it were, then section 8772 would have been perfectly permissible if Congress had just omitted the language rendering the law inapplicable to "any proceedings

other than proceedings referred to in subsection (b)"—even though doing so would have left the law with the exact same substantive effect on the exact same range of cases. Congress does not work any fundamental incursion on Article III prerogative by instructing a single court to resolve a common set of claims brought by several different parties rather than requiring several different courts to do so one by one.

Accordingly, whatever the Constitution may have to say about laws that target "a single pending case," Pet'r.Br.1, there is no need for this Court to resolve that question here, as the answer simply does not have any bearing on this case. Section 8772 does not change the law for a particular *case*; it changes the law for a particular *set of assets*. Any concerns that kind of targeted legislation may raise have no more to do with separation of powers principles than changing the law for a particular bridge, *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), or for 13 particular forests, *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992). *See infra* Part III.B. That does not change just because Congress has coupled a narrow substantive law with a narrow procedural mechanism for invoking it. The Constitution simply does not prevent Congress from trying to ease the burden on victims of acts of terrorism that occurred more than a decade ago (if not longer) by giving them a single forum in which one court can resolve common issues arising out of their efforts to finally collect on the many judgments that their different cases have produced.

2. Second, section 8772 does not dictate—whether "effectively" or otherwise—the outcome of the cases

that it governs. The conditions section 8772 imposes on execution of the assets in question in the subsection entitled "Court determination required" are not make-weights designed to cover up an effort to deprive the judiciary of its Article III power. They are critical components of the substantive law that section 8772 creates, included to ensure that the statute will allow execution or attachment only if doing so furthers *both* of the interests Congress sought to achieve.

Again, Congress was not simply looking to transfer wealth to a favored party, or even just to ensure that victims of the acts of terrorism that Iran has sponsored have a remedy for the wrongs they have suffered. Congress also wanted section 8772 to serve the equally important interest of holding *Iran itself* responsible for its role in those deplorable acts. As the government has explained time and again, one of the core goals of economic sanctions is to use financial pressure not just to punish Iran for its past acts, but to get Iran to cease sponsoring acts of terrorism in the future. Accordingly, when Congress required the court to find that the assets in question belong to Iran, and Iran alone, it was not reverse-engineering a legal test that would ensure that the court reached its preferred outcome. It was instead crafting a legal standard that maps directly onto the foreign policy concerns that section 8772 seeks to achieve.

To be sure, Congress may have had very good reason to believe that "Iran holds equitable title to, or the beneficial interest in, the assets" in question, "and that no other person possesses a constitutionally protected interest in th[ose] assets." 22 U.S.C. §8772(a)(2). But whether Congress *expected* the court

to reach certain answers to those questions does not change the fact that it did not *instruct* the court to do so. Indeed, the statute expressly contemplates the possibility that the district court could have found that Iran was *not* the only party with a "beneficial interest" in the assets, and creates a distinct rule to govern if the court were to make such a determination. *See id.* Congress can hardly be accused of "effectively dictating" the outcome of the proceeding when its own statute expressly recognizes that the district court could have reached a different result. Petitioner's decision not to dispute section 8772's requirements does not reflect that those requirements were meaningless; at most, it simply suggests that petitioner realized that disputing them would reveal the flaws in its separation of powers arguments.

Moreover, Congress did not confine section 8772 to any particular judgment or persons. It instead again set forth a standard by which the court is to determine whether the law applies, requiring the court to make an independent assessment of whether a claimant is, in fact, seeking to collect on a judgment for "compensatory damages awarded against Iran for damages for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, or hostage-taking, or the provision of material support or resources for such an act." 22 U.S.C. §8772(a)(1)(C). Sure enough, the district court denied turnover to three of the groups of plaintiffs that were part of this consolidated action when section 8772 was enacted because it found that those plaintiffs did not hold qualifying judgments. *See* Pet.App.19a-20a, 28a. At any rate, again, that Congress may have anticipated which claimants would satisfy that standard is beside

the point. What matters for constitutional purposes is that the statute leaves it in the court's hands, not Congress', to determine whether an individual who tries invokes the law falls within its reach.

Accordingly, any constitutional constraints on Congress' power to "effectively dictate" the outcome of litigation are, once again, not implicated here. Section 8772 does not compel the district court to reach any particular conclusion at all, let alone compel the court to do so in a manner that intrudes on Article III prerogative. *See infra* Part III.A. It simply establishes the criteria that must be satisfied in order for the relevant assets to be subject to execution, and then directs the court to make its own determination of whether that criteria is satisfied.

3. Finally, section 8772 bears no resemblance to the kinds of one-off statutes to which petitioner analogizes. Starting with petitioner's "most salient example," Pet'r.Br.34, the Terri Schiavo legislation was a one-off statute unrelated to any broader legislative effort. When Congress created federal court jurisdiction to hear claims on Terri Schiavo's behalf, Congress was not in the midst of some decades-long initiative to strike a proper balance between state and federal court jurisdiction in family disputes about medical treatment. Congress entered the fray for one case, and one case only. Indeed, whereas the Iran Threat Reduction and Syria Human Rights Act is 56 pages long and contains a wide range of provisions "in furtherance of [Congress'] broader goals ... to sanction Iran," 22 U.S.C. §8772(a)(2), the Act for the Relief of the Parents of Theresa Marie Schiavo was two pages long and did nothing other than create federal court

jurisdiction for a single case. *See* Pub. L. No. 109-3, 119 Stat. 15 (2005). Whatever the constitutional implications of such a statute may be, that kind of law is so dissimilar to this one as to render the comparison meaningless.

Petitioner's historical comparisons fare no better. *See* Pet'r.Br.30-32. All of the state court cases petitioner identifies concern laws divorced from any broader legislative initiative. Thus, to the extent they raised the specter of "[s]pecial laws ... pushed through the legislatures by unscrupulous men to serve private ends," *id.* at 30, they are readily distinguishable from the provision at issue here. Congress did not enact section 8772 out of a bare desire "to force one party to pay other parties billions of dollars for past injuries." *Id.* at 42. Congress enacted section 8772 to ensure that Iran would be forced to satisfy the undisputedly valid judgments that the victims of its unlawful actions obtain—not just because those victims are entitled to execution of the judgments that courts award them, but because ensuring that Iran is held financially responsible for the acts of terrorism that it sponsors is a critical component of the United States' efforts to protect its citizens from the threat that Iran will continue to sponsor such acts in the future.

Accordingly, whatever concerns the Framers may have had about legislative interference in private disputes among citizens, those, too, are inapposite here. The specificity of section 8772 reflects not a congressional desire to interfere with a private dispute (or with the independence of the judiciary), but rather a congressional effort to make sensitive foreign policy judgments unique to a particular country. Iran has

time and again refused to abide by international rules, and Congress is free to react by refusing to apply the same rules to Iran as it does to the rest of the international community. After all, the Framers granted Congress broad powers to address foreign relations. For those powers to be effective, Congress must be able to invoke them flexibly and sensitively to address specific threats posed by specific nations. It is thus no wonder that section 8772 is targeted at a particular country and set of assets. Foreign policy is not a place for one-size-fits-all rules; it would be absurd to require Congress to give Iran the same sovereign immunity as Ireland.

* * *

As the foregoing reveals, section 8772 is simply not what petitioner tries to make it out to be. The statute applies not to "a single pending case," Pet'r.Br.i, but to an entire class of cases. The statute does not "direct[] a particular result," whether "effectively" or otherwise. *Id.* And the statute is designed to further critical foreign policy objectives, not "to ensure that [Congress'] favored litigant prevails." *Id.* at 2. In short, the statute does not even implicate any of the constitutional concerns that petitioner identifies.

III. Section 8772 Does Not Violate Any Separation Of Powers Principle.

At any rate, petitioner's conception of the separation of powers constraints that this Court's cases impose on Congress' ability to legislate is fundamentally flawed. Properly understood, the principles that this Court has articulated do not prohibit Congress from legislating with specificity, or

from passing laws that are designed to affect the outcome of a pending case. They just require Congress to refrain from interfering with the judiciary's core role of deciding how *existing* law applies to a particular set of facts. Section 8772 does not interfere with that role at all.

A. Section 8772 Does Not Run Afoul of the Separation of Powers Principles Set Forth in *Klein*.

For all the ink that has been spilled about *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), its core holding is straightforward: Congress may not instruct an Article III court how to apply existing law to particular facts. Courts alone wield the power to take a law as written and apply it to the facts. If Congress seeks to affect the outcome of pending cases, it must do so by using its Article I powers to amend the law, not by telling courts how to perform their Article III function of applying the law to particular facts. The statute in *Klein* violated that separation of powers principle because it purported to instruct courts how to apply the existing legal framework governing reimbursement of captured property to the fact of a presidential pardon. Indeed, it purported to compel courts "to deny to pardons granted by the President the effect which this court had adjudged them to have." *Klein*, 80 U.S. at 145. This Court thus was "forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and [wa]s directed to give it an effect precisely contrary." *Id.* at 147

Accordingly, while *Klein* itself may not be a paragon of clarity, the principle it stands for is simple:

Congress cannot instruct an Article III court how to apply existing law to particular facts. This Court's cases confirm that understanding. In *Robertson*, for instance, the Court was not troubled by the fact that the challenged law singled out two pending cases. Nor was the Court troubled by the fact that Congress enacted the law for the specific purpose of putting an end to the litigation that it expressly referenced. Instead, it was enough to satisfy any separation of powers concerns that Congress had not tried to "direct[] decisions in pending cases *without amending any law*"; it instead "affected the adjudication of the cases" by "effectively modifying the provisions at issue in those cases." *Robertson*, 503 U.S. at 440-41 (emphasis added).

The Court reiterated the same understanding in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). As the Court explained there, "[w]hatever the precise scope of *Klein*, ... later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" *Id.* at 218 (quoting *Robertson*, 503 U.S. at 441). And in *Miller v. French*, 530 U.S. 327 (2000), this Court rejected a *Klein* challenge to the Prison Litigation Reform Act because the statute created "a new legal standard" rather than "prescribing a rule of decision." *Id.* at 349-50. Indeed, even petitioner's own *amici* agree that "*Klein*'s central distinction" is "between directing law application and amending the underlying law," FCS.Br.9, and identify *Klein*'s core holding as the principle that "Congress

may not direct the result in a pending case without amending the underlying law," *id.* at 4.[3]

Properly understood, then, the *Klein* question in this case is remarkably easy: Section 8772 does not direct courts how to apply existing law; it instead just changes the law that applies to the particular assets at issue. Congress did not instruct courts that, notwithstanding how the Uniform Commercial Code has been interpreted, attachment of the relevant assets must be found to satisfy its requirements. Nor did Congress say anything about whether the assets should be deemed attachable under the terms of the Foreign Sovereign Immunities Act, the Terrorism Risk Insurance Act of 2002, or any provision of law. Indeed, Congress could not have made clearer that it was creating a new law that would apply "*notwithstanding any other provision of law*" and was "preempting any inconsistent provision of State law" 22 U.S.C. §8772(a)(1) (emphasis added). Thus, rather than instructing the Court how to *apply* the law, Congress simply "'amend[ed] applicable law'" *Plaut*,

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[3] In fact, the principle *Klein* stands for is arguably even narrower than that. As scholars have noted, the statute at issue in *Klein* posed a particular problem because it sought to override the Court's interpretation of a *constitutional* provision. *See, e.g.*, Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 Nw. U. L. Rev. 437, 464 (2006) ("The Court was necessarily concerned ... that Congress was seeking to interfere with the judicial interpretation of constitutional provisions."); Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 Geo. L.J. 2537, 2540 (1998) ("Congress may not compel the courts to speak a constitutional untruth."). Section 8772, of course, raises no such concern.

514 U.S. at 218 (quoting *Robertson*, 503 U.S. at 441). That is exactly what this Court has said—repeatedly—that *Klein* in no way prohibits Congress from doing.

B. Article III Does Not Prohibit Congress From "Effectively Dictating" the Outcome of Cases.

Petitioner insists that *Klein* stands for a far more sweeping proposition—namely. that "legislatures may not dictate the outcome of pending cases." Pet'r.Br.19. That is simply not correct. It is well-settled that Congress may pass laws that apply to cases pending at the time of enactment—even when the new law is outcome-determinative. For example, in *Bruner v. United States*, this Court dismissed an action because, while the case was pending, Congress repealed the jurisdictional statute under which it had been filed. 343 U.S. 112 (1952). In *United States v. Schooner Peggy*, this Court reversed a decree condemning a French vessel because a treaty ratified while the case was pending provided for the restoration of captured property "not yet *definitively* condemned." 5 U.S. (1 Cranch) 103, 109 (1801); *see id.* at 110 ("[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed[.]"). And in *Cort v. Ash*, this Court reversed a grant of injunctive relief because Congress passed a statute while the case was pending that established an administrative procedure for adjudicating alleged violations of the statute at issue. 422 U.S. 66 (1975).

Indeed, Congress may pass laws with the express intention of dictating the outcome of a pending case.

In *Ex parte McCardle*, Congress stripped this Court of jurisdiction to review denials of petitions for *habeas corpus* while McCardle's case was pending in this Court. 74 U.S. 506 (1869). McCardle's attorney argued that the jurisdiction-stripping law was aimed specifically at McCardle and thus violated separation of powers principles. *Id.* at 510.[4] This Court rejected that argument and dismissed the case for want of jurisdiction, noting that the Court was "not at liberty to inquire into the motives of the legislature." *Id.* at 514. Congress also effectively dictated the outcome in *Wheeling*, a case that this Court explicitly distinguished in *Klein*, and *Robertson*, a case in which this Court explicitly distinguished *Klein*. As the Solicitor General pointed out during oral argument in *Robertson*, to prohibit Congress from legislating to impact a pending case would "essentially amount[] to a freezing theory that the pendency of a lawsuit [has] an injunctive effect, as it were, against the Congress of the United States." Transcript of Oral Argument at 46, *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992) (No. 90-1596). It would make little sense to allow private litigants to disable Congress from exercising its Article I powers by filing a lawsuit, and still less sense to disable Congress from addressing an issue when it is most squarely presented.

Clearly, then, *Klein* does not stand for the sweeping proposition that petitioner urges. Congress *can* effectively dictate the outcome of pending cases,

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[4] *See, e.g.*, Cong. Globe, 40th Cong., 2d Sess. 2061 (1868) (statement of Rep. James F. Wilson, R-Iowa) ("Most assuredly it was my intention to take away the jurisdiction given by the act of 1867 reaching the McCardle case[.]").

and it does so with regularity. *Klein* simply limits the method by which Congress may achieve that result. Under petitioner's reading, the constitutionality of a statute would turn not on the substance of the law or the degree to which it infringes on the power of other branches, but rather on the procedural posture of the cases to which it applies. That cannot be the law. Petitioner's "no dictating the outcome" principle cannot bear the weight placed upon it, either as a premise in this case or as a rule to apply to others.

Indeed, even petitioner's own *amici* recognize that *Klein* cannot plausibly be read as prohibiting Congress from passing laws designed to dictate the outcome of a pending case given the "numerous decisions holding that Congress may amend the law governing pending litigation." FCS.Br.7 In stark contrast to petitioner, petitioner's *amici* instead stress repeatedly just how "narrow" "*Klein's* core principle" really is. *Id.* at 4, 8. And rightly so, as *Klein* leaves Congress perfectly free to effectively dictate the result of pending cases by amending the applicable law; it just requires Congress to refrain from instructing an Article III court how to apply facts to existing law In short, as subsequent cases have made clear, *Klein* is a case about *how* Congress may effectively dictate the outcomes of cases—not about *whether* it may.[5]

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[5] Petitioner's *amici* make the baffling claim that section 8772 is unconstitutional because "no new law has been made" at all. FCS.Br.17. Both Houses of Congress and the President disagree. *See* Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214, 1258. Without a doubt, section 8772 is a new law governing the attachment of the assets in question for execution of certain judgments against Iran. To

C. Article III Does Not Require Laws to be Generally Applicable.

Finally, even assuming section 8772 applied to only "a single pending case" (and it does not), that, too, would pose no separation of powers problem. Indeed, petitioner's "single pending case" principle is a poor match for separation of powers doctrine, which is concerned with intrusions on other branches, not with constraints on the manner in which one branch may exercise the powers that it unquestionably possesses. If, as explained, section 8772 does not intrude on the judiciary's Article III function, then it is difficult to fathom how it could violate Article III simply because it impacts too few cases.

Although "legislatures usually act through laws of general applicability. that is by no means their only legitimate mode of action." *Plaut*, 514 U.S. at 239 n.9. In fact, Congress legislates with particularity quite often. Congress has passed laws impacting only a single bridge, *see Wheeling*, 59 U.S. at 429, only 13 forests, *Robertson*, 503 U.S. at 435-36, and only one President's papers, *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977). And the list goes on. *See, e.g.*, *United States v. Sioux Nation of Indians*, 448 U.S. 371, 389 (1980) (law declaring *res judicata* defense unavailable in one case); *Pope v. United States*, 323 U.S. 1, 10 (1944) (law directing court to apply a specified formula to one case); *Shawnee Tribe v. United States*, 423 F.3d 1204, 1207 (10th Cir. 2005) (law giving the Secretary of the Army discretion to convey a particular piece of

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be sure, the new law is not generally applicable, but that hardly means that it is no law at all.

property); *Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001) (law exempting a planned memorial from various federal statutes).

Moreover, although Congress passed private bills with greater regularity before the expansion of the administrative state, "[p]rivate bills in Congress are still common." *Plaut*, 514 U.S. at 239 n.9. In 2012, for example, Congress passed An Act For the Relief of Sopuruchi Chukwueke, which provided that one individual "shall be deemed to have been lawfully admitted to, and remained in, the United States, and shall be eligible for adjustment of status to that of an alien lawfully admitted for permanent residence." Priv. L. No. 112-1 (2012). In 2006, Congress passed the Betty Dick Residence Protection Act, the sole purpose of which was to "require the Secretary of the Interior to permit the continued occupancy and use of [a particular residence] by Betty Dick for the remainder of her natural life." Priv. L. No. 109-1 (2006). No one has ever suggested that the specificity of these laws renders them subject to some sort of separation of powers concern.

That is not to say that Congress' power to single out particular individuals or property is unfettered. But to the extent Congress is restrained from enacting laws that do not have general applicability, it is constrained by explicit constitutional provisions, not broad structural principles. For example, the Bill of Attainder Clause bars any law "that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon*, 433 U.S. at 468. The Equal Protection Clause mandates that every

legislative classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). The Takings Clause, Ex Post Facto Clause, Due Process Clause, and Privileges and Immunities Clause all likewise impact Congress' ability to single out individuals for particular benefits or burdens. It is these specific provisions—and not some vague notion of separation of powers—that prevent Congress from *improperly* singling out individuals and entities for adverse treatment.

At any rate, it is not at all clear how the scope of a statute's applicability "could in any way" impact whether it "infringe[s] upon the judicial power." *Plaut*, 514 U.S. at 238-39. Separation of powers principles are concerned with the aggrandizement of one branch at the expense of another. *See Miller*, 530 U.S. at 341 ("[T]he Constitution prohibits one branch from encroaching on the central prerogatives of another."); *Clinton v. Jones*, 520 U.S. 681, 699 (1997) ("The Framers 'built into the tripartite Federal Government ... a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" (alteration in original)). It is not concerned with how a single branch exercises its own power. *See Touby v. United States*, 500 U.S. 160, 167-68 (1991) ("The principle of separation of powers ... does not speak to the manner in which authority is parceled out within a single Branch."). Given that section 8772 does not intrude on the judicial role, *see supra* Part III.A, surely it cannot offend Article III simply because of how few cases it impacts. Once it is

clear that Congress has not intruded into the realm of one of its co-equal branches of government—and that is quite clear here—then only some *other* principle could limit how Congress can exercise its own power. By relying on the separation of powers, petitioner hangs its hat on the wrong constitutional hook.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

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In The
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BANK MARKAZI, aka THE CENTRAL BANK OF IRAN,

Petitioner,

v.

DEBORAH D. PETERSON, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF NATIONAL SECURITY LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. Congress Has Plenary Power to Regulate Foreign Commerce, Including the Disposition of Blocked Assets in Which Iran Has a Beneficial Interest 5

A. Pursuant to Its Authority to Regulate Foreign Commerce, Congress May Block Foreign Assets 6

B. The Political Branches Have Authority to Settle the Claims of United States Nationals Against Foreign States 7

II. Section 8772 Is an Integral Component of a Comprehensive Economic Sanctions Regime Against Iran Intended to Protect United States National Security, and Should Be Afforded Substantial Deference by the Judiciary 11

A. The Economic Sanctions Regime Against Iran 12

1. Early Economic Sanctions Against Iran 12

2. Legislation Imposing Economic Sanctions Against Iran 15

TABLE OF CONTENTS – Continued

Page

3. Recent Economic Sanctions Against Iran 18

(a) Executive Order 13599 18

(b) Iran Threat Reduction and Syria Human Rights Act of 2012 20

B. The Judiciary Should Afford the Political Branches Substantial Deference in the Context of National Security and Foreign Policy 22

III. Section 8772 Does Not Violate Separation of Powers 25

A. Section 8772 Does Not Compel a Court to Enter a Judgment for Plaintiffs or Assess Any Damages Against Iran 27

B. Section 8772 Clarifies the Standard for Attachment Under the TRIA in Regards to the Blocked Assets of Iran 30

C. Section 8772 is Not Unconstitutional Merely Because it Applies to a Limited Class of Pending Cases 33

CONCLUSION 35

TABLE OF AUTHORITIES

Page

CASES

Axel Johnson, Inc. v. Arthur Anderson & Co., 6 F.3d 78 (2d Cir. 1993) 33

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 33

Buttfield v. Stranahan, 192 U.S. 470 (1904) 5

Bd. of Tr. of Univ. of Ill. v. United States, 289 U.S. 48 (1933) 6

Dames & Moore v. Regan, 453 U.S. 654 (1981) 7, 8, 9, 24, 33

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Peterson v. Islamic Republic of Iran, 264 F. Supp. 2d 46 (D.D.C. 2003) 28

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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22 U.S.C. §§ 8701 *et seq.* 20

22 U.S.C. § 8772 ..... *passim*

22 U.S.C. § 8772(a) 21

22 U.S.C. § 8772(a)(1)(C) 20

TABLE OF AUTHORITIES – Continued

Page

22 U.S.C. § 8772(b) 34

22 U.S.C. § 8772(c) 34

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28 U.S.C. § 1610 note 16

§ 201(a), 116 Stat. 2337 ..... *passim*

§ 201(d)(2), 116 Stat. 2340 ..... 3, 17

Trading with the Enemy Act, 50 U.S.C. app. §§ 1-44 6

Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 ..... 9, 10

28 U.S.C. § 1606 9

28 U.S.C. § 1610 9

28 U.S.C. § 1606(a)(2)(A)(i)-(ii) 10

28 U.S.C. § 1606(c) 11

Fed. R. Civ. P. 55(a) 27

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

GLOSSARY OF ABBREVIATIONS

CISADA – Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010

IEEPA – International Emergency Economic Powers Act

ITRSHRA – Iran Threat Reduction and Syria Human Rights Act of 2012

ISA – Iran and Libya Sanction Act of 1996

TRIA – Terrorism Risk Insurance Act of 2002

TWEA – Trading with the Enemy Act of 1917

WMDs – Weapons of Mass Destruction

VTVPA – Victims of Trafficking and Violence Protection Act of 2000

INTEREST OF *AMICI*

Amici are law professors who teach and publish in the field of national security law.[1] Several of the *amici* have worked as advocates in the Judge Advocate General's Corp. on legal matters related to national security and counter-terrorism, or held senior-level positions in government working on issues involving national security, economic sanctions, and foreign policy. The members of the *amici* include: William C. Banks, Board of Advisors Distinguished Professor, Director of the Institute for National Security and Counterterrorism, Syracuse University College of Law; Kevin Cieply, President and Dean, Ave Maria School of Law; Geoffrey Corn, Presidential Research Professor of Law, South Texas College of Law; Jimmy Gurulé, Notre Dame Law School; Eric Talbot Jensen, Brigham Young University School of Law; Jeffrey D. Kahn, Southern Methodist University, Dedman School of Law; and Rachel E. VanLandingham, Southwestern Law School.[2]

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[1] This brief has been filed with the written consent of all parties, which filed blanket consents with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* affirms that no counsel for a party authored this brief, in whole or in part. Notre Dame Law School has committed $1,400.00 towards the cost of printing and mailing this brief.

[2] Academic affiliation is provided for identification purposes only.

The *amici* believe that the use of economic sanctions is a vital governmental tool to prevent state-sponsored acts of terrorism. Moreover, the *amici* appreciate the importance of the economic sanctions regime carefully crafted by Congress and five consecutive Presidents, working in close coordination, to prevent Iran from sponsoring terrorist activities and developing nuclear weapons of mass destruction (WMD). The *amici* also believe that 22 U.S.C. § 8772 is an integral component of the broader economic sanctions strategy against Iran, and advances vital national security and foreign policy interests. Finally, the *amici* maintain that the judiciary should afford substantial deference to deliberate congressional efforts, implemented with the full support of the Executive, to authorize United States victims of international terrorism to satisfy valid terrorism judgments against Iran with the blocked assets of Iran.

SUMMARY OF THE ARGUMENT

The United States has developed a comprehensive economic sanctions regime to prevent Iran, a state sponsor of terrorism, from sponsoring acts of international terrorism. The International Emergency Economic Powers Act (IEEPA), Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified at 50 U.S.C. §§ 1701 *et seq.*), enacted by Congress in 1977, is the central legal authority for the Iran economic sanctions program. Since the 1983 terrorist attacks against the American

servicemen in Beirut, Lebanon, the IEEPA has been extensively used to block Iranian assets and prohibit United States persons from doing business with Iran.

Following the September 11, 2001 terrorist attacks, Congress passed the Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337 (codified at 28 U.S.C. § 1610 note), which created an exception to the IEEPA ban on United States nationals from transferring or dealing in blocked assets of state sponsors of terrorism. The TRIA provides that the "blocked assets of [a] terrorist party" shall be available for execution or attachment to satisfy a judgment against a terrorist party on a claim based upon an act of terrorism. *Id.* § 201(a). Under the TRIA, Congress made a policy determination that national security and foreign policy interests would be better served by making blocked assets of a terrorist party available to compensate the victims of international terrorism, rather than have those assets languish in a United States bank account.

Permitting blocked assets of a terrorist party to be used to satisfy terrorism judgments against a state sponsor of terrorism serves several important national security and foreign policy interests. First, allowing blocked assets to be attached to enforce a terrorism judgment compensates the victims of terrorism for their loss. Second, such enforcement measures hold state sponsors of terrorism accountable for their complicity in acts of terrorism. Third, requiring state sponsors of terrorism to compensate the victims of

terrorism for their loss may deter them from supporting terrorist activities in the future. Finally, attaching blocked assets to satisfy a terrorism judgment provides an important incentive for private plaintiffs to bring similar claims against state sponsors of terrorism in the future. If such assets are placed beyond the reach of victims of terrorism because they are blocked under the IEEPA, this would discourage victims of international terrorism from bringing such tort claims against state sponsors of terrorism.

Section 8772 strengthens the United States economic sanctions regime against Iran. The statute modifies and supplements § 201 of the TRIA, by clarifying Congress's intent that the blocked assets "of" a terrorist party are not limited to assets owned by that terrorist party, but include blocked assets in which a terrorist party holds a beneficial interest. Moreover, § 8772 makes the TRIA coextensive with Executive Order 13599, 77 Fed. Reg. 6659 (Feb. 5, 2012), which authorizes blocking the assets of the Government of Iran, including the Central Bank of Iran. Specifically, § 8772 provides that $1.75 billion of blocked assets in which the Government of Iran has a beneficial interest shall be subject to attachment to satisfy terrorism judgments against Iran that have been consolidated into a single case if a court determines two preconditions are met.

Despite claims to the contrary, § 8772 was not intended by Congress to tip the scale in favor of one party over another in a pending case, but, instead, to clarify Congress's intent under the TRIA, and to

strengthen the economic sanctions regime against Iran. Further, the judiciary should grant substantial deference to the political branches when, as here, they act in concert against a foreign nation to accomplish a foreign policy objective vital to our national security. Finally, by making the blocked assets of Iran held by Citibank "subject to" attachment to satisfy terrorism judgments against Iran in a pending case, Congress did not usurp the role of the judiciary, and did not violate the doctrine of separation of powers.

ARGUMENT

I. Congress Has Plenary Power to Regulate Foreign Commerce, Including the Disposition of Blocked Assets in Which Iran Has a Beneficial Interest

Article I of the Constitution gives Congress the exclusive and plenary authority "[t]o regulate commerce with foreign nations[.]" U.S. Const. art. I, § 8, cl. 3. The authority to regulate foreign commerce extends to foreign assets used in international commerce. *Orvis v. Brownell*, 345 U.S. 183, 188 (1953); *Propper v. Clark*, 337 U.S. 472, 482-86 (1949). It includes the power to block and dispose of the assets of foreign nations that are held in a United States bank account. Congress shares its authority over interstate commerce with the states, but the power of Congress over foreign commerce is "exclusive and absolute." *Buttfield v. Stranahan*, 192 U.S. 470, 492-93 (1904). As such, Congress has even greater authority

when it comes to regulating commerce with foreign nations. *Bd. of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 60 (1933). The primary purposes of the foreign commerce clause are protection of national security and ensuring uniformity in foreign policy. *Id.* From a regulatory standpoint, this distinction makes foreign commerce, and by extension, foreign assets, different in kind from domestic commerce. Pursuant to this exclusive and plenary power, Congress created a comprehensive scheme of regulations governing commercial transactions with the Islamic Republic of Iran. As part of that comprehensive regulatory scheme, § 8772 is a proper exercise of the power of Congress to regulate commerce with foreign nations. 22 U.S.C. § 8772.

A. Pursuant to Its Authority to Regulate Foreign Commerce, Congress May Block Foreign Assets

In 1977, Congress enacted the IEEPA, Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified at 50 U.S.C. §§ 1701 *et seq.*), which delegates to the Executive sweeping authority to impose economic sanctions and block foreign assets in times of declared national emergencies. The IEEPA essentially amended the Trading with the Enemy Act of 1917 (TWEA), 50 U.S.C. app. §§ 1-44, leaving the TWEA intact for times of war. Under the IEEPA, Congress delegated extensive authority to the President to impose economic sanctions against foreign nations as well as their nationals, and to block their assets. Significantly,

the President can prohibit United States banks from engaging in any transactions involving funds in which a foreign country or national thereof has any interest and order that such funds be blocked. 50 U.S.C. § 1702(a)(1)(A)(i). The Office of Foreign Assets Control, the agency within the Department of Treasury responsible for administering economic sanctions programs under the IEEPA, defines "interest" broadly in its regulations and does not restrict blocking actions merely to property in which a foreign nation or national has an ownership interest. 31 C.F.R. § 544.305 (2015). Ultimately, Congress retains concurrent authority to block foreign assets and direct their disposition.

B. The Political Branches have Authority to Settle the Claims of United States Nationals Against Foreign States

Where a United States national has a claim against a foreign state, "it is not for the court, but for the government, to consider whether it be a case proper for compensation." *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801). This Court in *Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981) examined the authority of the political branches to regulate the settlement of claims of United States nationals against the Government of Iran. In that case, Dames & Moore sued Iran and secured judgment by obtaining a prejudgment attachment of Iranian property blocked by an Executive Order issued in response to the 1979 Hostage Crisis in

Tehran. *Id.* at 663-64. Subsequently, to secure the release of the hostages, President Carter entered into an executive agreement under which the United States was obligated to "terminate legal proceedings in United States courts involving claims of United States nationals against Iran, to nullify all attachments and judgments obtained therein, and [refer all such terminated claims] to binding arbitration in an Iran-United States Tribunal." *Id.* at 654.

In *Dames & Moore v. Regan*, this Court addressed the power of the political branches to suspend thousands of claims pending in Article III courts, nullify the prejudgment attachments of American creditors, and order the transfer of blocked assets back to Iran. This Court held unanimously that the President could suspend those claims and, when acting pursuant to congressional acquiescence and the "sweeping and unqualified" authority under the IEEPA, was permitted to "override judicial remedies" and "otherwise permanently dispose of the assets." *Id.* at 671. Moreover, this Court held that the President's nullification of prejudgment attachments did not usurp the role of the judiciary, and therefore did not violate separation of powers. *Id.* at 684. Congressional acquiescence to the President's conduct was central to the Court's decision. *Id.* at 668-70.

Section 8772 is also the product of coordinated action by the Legislative and Executive Branches. While the Executive Order in *Dames & Moore* transferred and nullified prejudgment attachments on blocked assets in response to the Iranian Hostage

Crisis, § 8772 made specific blocked assets available for attachment in satisfaction of judgments stemming from several terrorist attacks sponsored by Iran. In both instances, however, Congress and the President worked together to regulate Iranian assets pursuant to the IEEPA and control their disposition. Applying the reasoning of *Dames & Moore*, if Congress can grant authority to nullify interests of American creditors in blocked assets, it follows that Congress can also nullify the interests of a state sponsor of terrorism in blocked assets, and authorize courts to attach those blocked assets in satisfaction of outstanding terrorism judgments against Iran.

This conclusion is bolstered by the longstanding practice of Congress to settle the claims of United States nationals against foreign states by passing legislation. For example, in 2000, Congress passed legislation governing the payment of specified judgments against Iran and Cuba obtained by victims of state-sponsored terrorism. Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. No. 106-386, § 2002, 114 Stat. 1464 (codified at 28 U.S.C. §§ 1606, 1610). In the VTVPA, Congress directed the Department of Treasury to use blocked assets of Iran and Cuba as well as proceeds from consular property rentals to pay the judgments of persons who:

> as of July 20, 2000, held a final judgment for a claim or claims brought under [28 U.S.C. § 1605(a)(7)] against Iran or Cuba, or * * * filed suit under such section * * * on February

> 17, 1999, December 13, 1999, January 28, 2000, March 15, 2000, or July 27, 2000.

28 U.S.C. § 1606(a)(2)(A)(i)-(ii).

Like § 8772, the VTVPA referred to specific judgments and lawsuits. While § 8772 does so by reference to the name of the case into which multiple judgments have been consolidated, the VTVPA did so by reference to judgments obtained by a certain date (the cut off was three months prior to the enactment, so at the time, it necessarily extended to only six judgments) and to five specific dates on which an additional five lawsuits had already been filed, but judgments had not yet been entered. The effect of both statutes is the same – they apply only to a limited number of pending cases expressly identified by Congress in the statute. The VTVPA applied to one case against Cuba and ten cases against Iran, while § 8772 applies to eighteen judgments against Iran. *In re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d 31, 57 (D.D.C. 2009); *see also* David M. Ackerman, Cong. Research Serv., *Suits Against Terrorist States* 10, 14-17 (2002). Similar to § 8772, the VTVPA also specified how these judgments would be funded. The VTVPA required that to the extent any judgments against Iran were paid by the United States government from general treasury funds, the President would recover that amount from Iran "preceding the normalization of relations" and that "no funds shall be paid to Iran, or released to Iran, from property blocked under the [IEEPA] or from the Foreign Military Sales Fund, until such subrogated

claims have been dealt with to the satisfaction of the United States." 28 U.S.C. § 1606(c).

II. Section 8772 Is an Integral Component of a Comprehensive Economic Sanctions Regime Against Iran Intended to Protect United States National Security, and Should Be Afforded Substantial Deference by the Judiciary

Iran is "the most active state sponsor of terrorism," and poses an extraordinary threat to United States national security. U.S. Dep't of State, *Country Reports on Terrorism 2014* 284-85 (2015), *available at* http://www.state.gov/documents/organization/239631.pdf. Iran is responsible for financing, supervising, and supporting some of the most deadly terrorist attacks perpetrated against the United States. *Id.* Moreover, the U.S. Department of Defense estimates that Iran provides between $100-200 million per year in funding to Hezbollah. U.S. Dep't of Def., *Unclassified Annual Report on Military Power of Iran* 8 (2010), *available at* http://fas.org/man/eprint/dod_iran_2010.pdf. To curtail Iran's terrorist activities and reduce its ability to develop nuclear WMDs, the political branches have devised a complex and comprehensive counter-terrorism and economic sanctions strategy against Iran.

A. The Economic Sanctions Regime Against Iran

Section 8772 is not an isolated act intended to advantage one party over another in a pending case. Rather, it is an integral part of a deliberate and coordinated effort by Congress and five consecutive presidents over the past thirty years to regulate the foreign assets of Iran in order to advance vital national security and foreign policy interests. The statute is part of a broader and carefully designed counter-terrorism strategy against Iran, which is fully supported by the Executive Branch, and should not be undermined by the judiciary.

1. Early Economic Sanctions Against Iran

Since the Iranian Revolution and Iranian Hostage Crisis of 1979, the United States has imposed economic sanctions against Iran. The IEEPA has been the central legal authority for the comprehensive economic sanctions regime against Iran. In November 1979, President Carter issued Executive Order 12170, declaring a national emergency against Iran. 44 Fed. Reg. 65,729 (Nov. 14, 1979). Executive Order 12170 blocked "all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States[.]" *Id.* President Carter subsequently issued Executive Orders instituting a total embargo on United States exports to Iran, Exec. Order No.

12,205, 45 Fed. Reg. 24,099 (Apr. 7, 1980), as well as banning all imports from Iran and prohibiting United States citizens from traveling to Iran, Exec. Order No. 12,211, 45 Fed. Reg. 26,685 (Apr. 17, 1980). However, the Executive Orders were repealed in 1981, pursuant to a bilateral agreement known as the Algiers Accords, in return for which Iran released the American hostages. Exec. Order No. 12,282, 46 Fed. Reg. 7925 (Jan. 19, 1981).

During the Lebanese civil war, the United States began stationing Marines in Beirut, Lebanon in August 1982 as part of an international peacekeeping force. Patrick Taylor, *A World of Trouble: The White House and the Middle East – From the Cold War to the War on Terrorism* 283-84 (2009). On April 18, 1983, a suicide-bomber detonated a truck loaded with explosives in front of the American embassy, killing sixty-three people and wounding dozens more. *Id.* at 290-92. Six months later, on October 23, 1983, another suicide-bomber detonated a truck bomb inside the United States Marine barracks in Beirut, killing 241 American servicemen and injuring over 100 more. *Id.* at 297-98. Hezbollah claimed responsibility for both terrorist attacks. Kenneth M. Pollack, *The Persian Puzzle: The Conflict Between Iran and America* 203 (2004).[3] American intelligence agencies determined that Iran was responsible for training Hezbollah

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[3] *See also* Quinton Cannon Farrar, *U.S. Energy Sanctions and the Race to Prevent Iran From Acquiring Weapons of Mass Destruction*, 79 Fordham L. Rev. 2347, 2354-55 (2011).

terrorists, as well as funding and supervising the attacks. *Id.*

In response to Iran's complicity in the Beirut terrorist bombings, in January 1984, the U.S. Department of State designated Iran a state sponsor of terrorism. *See* 49 Fed. Reg. 2,836 (Jan. 23, 1984).[4] Iran has maintained that infamous distinction for the last thirty years. *See Country Reports on Terrorism 2014*, *supra* at 8. Further, after finding that Iran was "actively supporting terrorism as an instrument of state policy," President Reagan issued Executive Order 12613, which banned all imports of goods and services originating in Iran. 52 Fed. Reg. 41,490 (Oct. 28, 1987). In 1992, Congress became involved in imposing economic sanctions against Iran by enacting the Iran-Iraq Arms Non-Proliferation Act of 1992, Pub. L. No. 102-484, 106 Stat. 2571 (codified at 50 U.S.C. § 1701 note), which significantly tightened restrictions on United States exports to Iran.

On March 15, 1995, President Clinton, pursuant to the IEEPA, issued Executive Order 12957, which prohibited all United States investment in Iran's energy sector. 60 Fed. Reg. 14,615 (Mar. 15, 1995). Two months later, the President issued Executive Order 12959, banning all trade between the United States and Iran, including trade by foreign subsidiaries

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[4] Iran was designated a state sponsor of terrorism pursuant to 50 U.S.C. app. § 2405(j), 22 U.S.C. §§ 2371, 2780(d).

of American corporations. 60 Fed. Reg. 24,757 (May 6, 1995). President Clinton tightened restrictions even further in 1997, issuing Executive Order 13059, which prohibited United States companies from knowingly exporting goods to a third country for incorporation into products destined for Iran. 62 Fed. Reg. 44,531 (Aug. 21, 1997).

In 2005, President Bush issued Executive Order 13382, prohibiting the importation into the United States of goods, technology, or services produced or provided by foreign persons who have been sanctioned because of their WMD proliferation activities. 70 Fed. Reg. 38,567 (June 28, 2005).

2. Legislation Imposing Economic Sanctions Against Iran

Congress has played a prominent role in constructing the economic sanctions regime against Iran. While United States trade with Iran significantly diminished after the issuance of Executive Order 12959 in March of 1995, Iran was still able to sell its oil and finance the development of its energy sector by increasing business with foreign countries. In response, Congress enacted the Iran and Libya Sanctions Act of 1996 (ISA), which imposed sanctions against *foreign* firms that reached a monetary threshold level of involvement in Iran's energy sector. Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (codified in part at 50 U.S.C. § 1701 note). The ISA was intended to force foreign

firms to choose between entering into energy-related transactions with Iran and doing business with the United States, essentially amounting to a "secondary boycott" of Iran. *See* Meredith Rathbone, Peter Jeydel & Amy Lentz, *Sanctions, Sanctions, Sanctions Everywhere: Forging a Path through Complex Transactional Sanctions Laws*, 44 Geo. J. Int'l L. 1055, 1069, 1085 (2013).[5]

Among other things, the IEEPA prohibits U.S. persons from transferring, withdrawing, or otherwise dealing in blocked assets. Congress created an exception to this prohibition following the September 11, 2001 terrorist attacks, enacting the Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107-297, § 201, 116 Stat. 2322 (codified at 28 U.S.C. § 1610 note). Section 201(a) of the TRIA provides that:

> in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, for which a terrorist party is not immune under 28 U.S.C. § 1605(a)(7), the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment * * * in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

Id. § 201(a).

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[5] *See also* Farrar, *supra* note 3 at 2359-60.

Section 201(a) represents a deliberate policy judgment by Congress that the blocked assets of a terrorist party, including state sponsors of terrorism, should be subject to attachment to satisfy judgments awarded to terrorism victims against that terrorist party, rather than remain blocked and left to languish in a bank account.[6] While blocking actions under the IEEPA keep blocked assets out of the hands of state sponsors of terrorism, the TRIA went one step further by making those assets subject to attachment to compensate the victims of terrorism for their loss.

In 2010, Congress enacted legislation to strengthen economic sanctions against Iran, passing the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA), Pub. L. No. 111-195, 124 Stat. 1312 (codified in part at 50 U.S.C. § 1701 note). The CISADA greatly expands the scope of prohibited activities, banning foreign companies from selling, leasing, or providing to Iran any goods, services, technology, information, or support that would assist Iran in maintaining or expanding its petroleum refineries, and prohibiting foreign businesses from supplying refined petroleum products to Iran. *Id.* § 102. The CISADA also restricts certain international banking relationships to protect the United States financial system from being used by

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[6] The term "blocked assets" is further defined in the TRIA as "any asset seized or frozen by the United States under" the TWEA or the IEEPA. § 201(d)(2), 116 Stat. 2340.

Iran to transfer funds to support terrorism and develop WMDs.[7] *Id.* § 104.

3. Recent Economic Sanctions against Iran

(a) Executive Order 13599

President Obama has issued several Executive Orders strengthening the economic sanctions against Iran.[8] Most pertinent to this case is Executive Order 13599, which provides that:

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[7] U.S. Dep't of Treasury, Iran Sanctions, *CISADA: The New U.S. Sanctions on Iran*, Sanctions Programs and Country Information, http://www.treasury.gov/resourcecenter/sanctions/Programs/Documents/CISADA_english.pdf (last updated Nov. 11, 2015).

[8] *See, e.g.*, Exec. Order No. 13,590, 76 Fed. Reg. 72,609 (Nov. 20, 2011) (imposing penalties on foreign companies with sales to Iran of equipment and services related to Iran's oil industry exceeding a certain threshold); Exec. Order No. 13,608, 77 Fed. Reg. 26,409 (May 1, 2012) (placing individuals and entities violating Iranian sanctions on a Foreign Sanctions Evaders List, and prohibiting such persons from entering the United States or doing business with any United States businesses or individuals); Exec. Order No. 13,622, 77 Fed. Reg. 45,897 (July 30, 2012) (imposing sanctions on foreign financial institutions and persons which knowingly conduct or facilitate significant financial transactions with, or purchase petroleum products from, Iranian oil companies); and Exec. Order No. 13,645, 78 Fed. Reg. 33,945 (June 3, 2013) (imposing sanctions on foreign financial institutions that engage in any significant transactions related either to the Iranian auto industry or the purchase and sale of Iranian rials, including the maintenance of significant funds denominated in Iranian rials outside Iran).

> [a]ll property and interests in property of the Government of Iran, including the Central Bank of Iran, that are in the United States, that are or hereafter come within the United States, or that hereafter come within the possession or control of any United States person, including any foreign branch, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.

Exec. Order No. 13,599, 77 Fed. Reg. 6659 (Feb. 5, 2012). The Office of Foreign Assets Control has determined that Executive Order 13599 "requires U.S. persons to block all property and interests in property of the Government of Iran, unless otherwise exempt under OFAC." Office of Foreign Assets Control, U.S. Dep't of Treasury, *Frequently Asked Questions: Iran Sanctions*, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_iran.aspx (last updated Oct. 22, 2015). Further, "[a]mong other things [Executive Order 13599] freezes all property of the Central Bank of Iran and all other Iranian financial institutions, as well as all property of the Government of Iran[.]" U.S. Dep't of Treasury, Press Release, *Fact Sheet: Implementation of National Defense Authorization Act Sanctions on Iran* (Feb. 6, 2012), http://www.treasury.gov/press-center/press-releases/Pages/tg1409.aspx. Pursuant to Executive Order 13599, on February 6, 2012, the government blocked the assets of Bank Markazi, the Central Bank of Iran, that were being held in a Citibank account in New York.

(b) Iran Threat Reduction and Syria Human Rights Act of 2012

In August 2012, Congress enacted the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRSHRA), Pub. L. No. 112-158, 126 Stat. 1214 (codified at 22 U.S.C. §§ 8701 *et seq.*), amending prior legislation and imposing additional economic sanctions against Iran. Section 502 of the ITRSHRA, codified at 22 U.S.C. § 8772, supplements the TRIA and Executive Order 13599 by providing that "notwithstanding any other provision of law * * * the financial assets that are identified in and the subject of the proceedings in * * * Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)" "shall be subject to execution or attachment * * * in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death" stemming from Iranian-sponsored terrorism if the court determines that two preconditions are met. *Id.* § 8772(a)(1)(C). Section 8772 clarifies Congress's intent under § 201(a) of the TRIA that the blocked assets of Iran subject to attachment to satisfy terrorism judgments are not limited to assets owned by Iran, but include blocked assets in which Iran has a beneficial interest.[9] Further, § 8772 trumps the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1611(b)(1), removing

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[9] In the case of the blocked assets at issue here, Bank Markazi, the Central Bank of Iran, is the sole owner. *See* Pet. App. 97a, 98a n.10, 99a.

any immunity previously held by the Central Bank of Iran. 22 U.S.C. § 8772(a).

The IEEPA, TRIA, Executive Order 13599, and § 8772 work in tandem and comprise a legal framework for regulating and disposing of the blocked assets of Iran. First, the IEEPA authorizes the President, upon declaring a national emergency, to block the assets in which a foreign nation or national thereof has any interest. 50 U.S.C. § 1702(a). The IEEPA prohibits United States persons and entities from dealing in blocked property. *Id.* § 1705(a). Pursuant to the IEEPA, President Obama issued Executive Order 13599, blocking "[a]ll property and interests in property of the Government of Iran, including the Central Bank of Iran." 77 Fed. Reg. at 6659. Second, the TRIA created an exception to the IEEPA's blanket ban on dealing in blocked property, permitting persons with a terrorism judgment against a terrorist party to satisfy such judgments by attaching blocked assets of that terrorist party to the extent of any compensatory damages. § 201(a), 116 Stat. 2337 Finally, § 8772 ensures that the authority to attach blocked assets under the TRIA to satisfy a terrorism judgment against Iran is coextensive with Executive Order 13599. Section 8772 is consistent in scope, authorizing the attachment of blocked assets in which the district court determines the Government of Iran holds a beneficial interest to satisfy judgments entered against Iran for sponsoring terrorist attacks.

B. The Judiciary Should Afford the Political Branches Substantial Deference in the Context of National Security and Foreign Policy

Under the doctrine of separation of powers, it is well established that when the political branches are acting in the field of national security and foreign affairs, their actions should be afforded deference by the judiciary.[10] This Court explained in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010), that such deference is warranted because "Congress and the Executive are uniquely positioned to make principled distinctions between activities that will further [national security] and undermine United States foreign policy, and those that are not."

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[10] *See, e.g.*, *Regan v. Wald*, 468 U.S. 222, 242 (1984) ("Matters relating 'to the conduct of foreign relations * * * are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'") (internal citation omitted); *Rostker v. Goldberg*, 453 U.S. 63, 64 (1981) ("The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference."); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) ("It is pertinent to observe that any policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.").

In *Humanitarian Law Project*, this Court rejected challenges to the constitutionality of 18 U.S.C. § 2339B, which criminalizes the provision of material support to a foreign terrorist organization. Plaintiffs argued the statute should require proof that the material support was provided with the specific intent to further the terrorist activities of such an organization. 561 U.S. at 8. Congress, however, made explicit findings in the legislative history that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution to such an organization* facilitates that conduct." *Id.* (emphasis in original) (internal citations omitted). Moreover, Congress's position was supported by an affidavit filed by a State Department official, concluding, "it is highly likely that any material support to these organizations will ultimately inure to the benefit of their criminal, terrorist functions – regardless of whether such support was ostensibly intended to support non-violent, non-terrorist activities." *Id.* at 33 (quoting McKune Aff., App. 133, ¶ 8).

The Court refused to second-guess the judgments of the political branches in the realm of national security and counter-terrorism, declaring:

> That evaluation of the facts by the Executive, like Congress's assessment, is entitled to deference. This litigation implicates sensitive and weighty interests of national security and foreign affairs * * * We have noted that "neither the Members of this Court nor most federal judges begin the day with

> briefings that may describe new and serious threats to our Nation and its people." It is vital in this context "not to substitute * * * our own evaluation of evidence for a reasonable evaluation by the Legislative Branch."

Id. at 33-34 (internal citations omitted).

This Court's reasoning in *Humanitarian Law Project* applies with equal force in the present case. Working in coordination with the Executive Branch, Congress determined that the blocked assets of the Central Bank of Iran valued at $1.75 billion should be subject to attachment to satisfy several judgments against Iran for its complicity in sponsoring deadly terrorist attacks against United States nationals. In so concluding, Congress advances legitimate national security and foreign policy goals, which include holding Iran accountable for sponsoring acts of terrorism, compensating the victims of Iranian-sponsored terrorist acts for their loss, and deterring Iran from engaging in terrorist-related activity in the future. This determination by Congress and the Executive on the regulation and disposition of Iranian assets blocked under the IEEPA, which is part of the broader sanctions program against Iran, is entitled to substantial deference by the judiciary.

Finally, § 8772 should be upheld under the principle set forth by Justice Jackson in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring), and affirmed in *Dames & Moore v. Regan*, 453 U.S. 654, 668-69 (1981). Justice Jackson stated that when

the President acts pursuant to an express or implied authorization from Congress, he exercises not only his own powers, but also those delegated by Congress. In such cases, the executive action "would be supported by the strongest presumption and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Youngstown*, 343 U.S. at 637.

While *Youngstown* is an executive powers case, the principle articulated by Justice Jackson has equal application when Congress acts with the full support of the Executive. With respect to § 8772, the Department of Justice was invited by this Court to express its views on whether Bank Markazi's petition for certiorari should be granted. In its brief, the Department of Justice concluded that § 8772 was lawful and did not violate the separation of powers, recommending that the Court deny the petition. U.S. Cert. Br. 19, 24. Thus, § 8772, as an act of Congress passed in coordination with Executive Order 13599, and explicitly supported by the Executive Branch, is entitled to "the strongest presumption and widest latitude of judicial interpretation," and should be upheld by the Court. *Youngstown*, 343 U.S. at 637

III. Section 8772 Does Not Violate Separation of Powers

Section 8772 does not compel a court to enter a judgment for plaintiffs or assess any damages against Iran. Iran's liability and resulting obligations to pay

compensatory damages to each of these plaintiffs were both established by independent Article III tribunals several years before the enactment of § 8772. Moreover, § 8772 does not limit the district court's authority and require the judgments in these proceedings to be satisfied only with the blocked assets of Iran held in the Citibank account. Rather, § 8772 expressly clarifies that certain enumerated assets are "subject to" attachment under the TRIA in satisfaction of outstanding terrorism judgments against Iran so long as a court determines that two preconditions are met. 22 U.S.C. § 8772.

No court has ever found that merely identifying particular assets as subject to attachment in satisfaction of valid outstanding judgments violates separation of powers. While the applicability of § 8772 is admittedly narrow, in the context of foreign affairs and national security, this is both permissible and reasonable. Iran is required under United States law to pay these eighteen judgments regardless of whether it uses the assets described in § 8772 or some other resources to do so. In the years since these judgments were entered, Iran has never made any payments and it does not indicate now that it plans to do so in the future. Instead, petitioner uses this litigation as an attempt to evade its responsibility to pay valid judgments awarded by Article III courts to the surviving family members of United States nationals killed or seriously wounded by Iranian-sponsored acts of terrorism.

Considering Iran's reprehensible conduct in financing the terrorist attacks that support these judgments, followed by its staunch refusal to pay the resulting damages, petitioner's contrived attempt to use separation of powers as a shield from its obligations is a perversion of revered constitutional precepts.

A. Section 8772 Does Not Compel a Court to Enter a Judgment for Plaintiffs or Assess Any Damages Against Iran

The eighteen judgments to which § 8772 applies are the product of extensive litigation before independent judges and damage assessments proposed by neutral special masters. Bank Markazi does not dispute the validity of these judgments nor does it allege that Iran has ever made or will make an effort to pay plaintiffs' outstanding judgments. Pet. App. 55a. Instead, petitioner argues that in providing courts with the proper tool to enforce these eighteen judgments by allowing execution against $1.75 billion in Iranian blocked assets held by Citibank, Congress violated separation of powers.

In each of the eighteen proceedings below, Iran did not respond to the complaint, though it was properly served, and failed to defend itself in court, despite having ample opportunity to do so. Under normal circumstances, a court would award the plaintiff a default judgment solely on the basis of defendant's failure to respond. Fed. R. Civ. P. 55(a).

However, in these cases, under 28 U.S.C. § 1608(e), each plaintiff also needed to "establish[ ] his claim or right to relief by evidence satisfactory to the court" before a default judgment was entered. The district court required each plaintiff "to establish their right to relief by clear and convincing evidence." *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 48 (D.D.C. 2003).

Thus, in each of these eighteen cases, before entering a default judgment, an independent Article III tribunal concluded that there was clear and convincing evidence that (1) Iran was a state sponsor of terrorism at the time of or as a result of the terrorist attack; (2) each plaintiff was a United States national at the time of the attack; and (3) Iran committed acts of terrorism, including "extrajudicial killing, aircraft sabotage, hostage taking, or [provided] material support or resources for such an act" which was "reasonably certain (i.e., more likely than not)" to cause injury to the plaintiff under at least one of several theories of liability. 28 U.S.C. § 1605A(a)(1); *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 67-68, 81 (D.D.C. 2010); *Hill v. Republic of Iraq*, 328 F.3d 680, 681 (D.C. Cir. 2003). The district courts individually considered the claims of over 1,000 plaintiffs, and engaged in a factual inquiry with particularized rulings in each cause of action raised. *See Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25 (D.D.C. 2007). Iran did not dispute these allegations at trial, nor does petitioner challenge the judicial determinations now.

Upon entering a judgment for the plaintiffs, these cases were referred to special masters for further consideration of the appropriate amount of monetary damages to be awarded to each plaintiff. *Id.* at 52-53. It was the job of these neutral special masters to follow the court's administrative framework and "undertake a very thorough, painstaking review of all the relevant testimony, medical evidence, economic reports, and other evidence in order to make clear, accurate recommendations" to the court relating to the damages suffered by each plaintiff. *In re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d 31, 110 (D.D.C. 2009).

Congress did not dictate any of these judgments. Rather, § 8772 was enacted by Congress to help give effect to the judgments already entered by independent tribunals. The only effect of § 8772 is to clarify the authority of the judiciary under the TRIA to attach particular assets (that were already judicially restrained in 2008 and blocked by the President in February 2012) in satisfaction of the outstanding judgments upon a finding that two preconditions are met.

In contrast to the statute invalidated in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), which prevented judges from giving effect to executive pardons, § 8772 furthers the interests of the Judicial and Executive Branches rather than curtail them. Section 8772 helps the courts to enforce outstanding judgments whereas the statute in *Klein* constricted

the operation of judicial processes. In enacting § 8772, Congress merely provided a clear standard for attachment of these blocked assets in order to help the court enforce its outstanding judgments and further the foreign policy goals of the Legislative and Executive Branches.[11] As such, § 8772 is readily distinguishable from the statute struck down in *Klein*.

B. Section 8772 Clarifies the Standard for Attachment Under the TRIA in Regards to the Blocked Assets of Iran

Section 8772 was enacted to help the judiciary execute the judgments entered against state sponsors of terrorism by Article III tribunals. The obstacles encountered by the plaintiffs in this case are a testament to the difficulty of executing judgments against a foreign state that is unwilling to pay them. Congress enacted the TRIA with a more general application that was aimed at helping plaintiffs in this predicament satisfy their outstanding judgments against state sponsors of terrorism. § 201(a), 116 Stat. 2337 However in certain instances, narrow construction of the TRIA by the judiciary has prevented § 201(a) from achieving the legislative goals of holding

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[11] Section 8772 does not restrict courts to satisfying the outstanding judgments with only these assets. If other assets became available, the court could allow plaintiffs to attach them as well. Section 8772 merely enhances the ability of the judiciary to enforce its judgments.

Iran accountable for sponsoring terrorism and compensating its victims.

Specifically, some courts have held that the "blocked assets of" a terrorist party subject to attachment under § 201(a) of the TRIA includes only those assets in which a state sponsor of terrorism had an ownership interest. *Heiser v. Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013). However, Congress did not intend to limit the class of assets subject to attachment under the TRIA to merely those blocked assets that Iran, or any state sponsor of terrorism, owns outright. Such a narrow construction places the overwhelming majority of blocked assets beyond the reach of United States victims of terrorism with outstanding judgments.

There are few assets subject to United States jurisdiction in which a state sponsor of terrorism has an outright ownership interest. After thirty years of economic sanctions, Iran is very experienced in structuring its financial transactions to evade detection by United States federal regulators.[12] Executive

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[12] Office of Foreign Assets Control, U.S. Dep't of Treasury, *Advisory on the Use of Exchange Houses and Trading Companies to Evade U.S. Economic Sanctions Against Iran* (Jan. 10, 2013), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/20130110_iran_advisory_exchange_house.pdf; Memorandum of Order, *United States v. HSBC Bank USA, N.A.*, No. 1:12 Cr. 00763 (E.D.N.Y. 2013) (HSBC affiliates assisted Iran in evading U.S. sanctions from 2000 to 2006 by "altering and routing payment messages in a manner that hid the identities of" the sanctioned entities party to the transactions).

Order 13599 was issued precisely in response to such practices. *See* 77 Fed. Reg. at 6659 (issued "particularly in light of the deceptive practices of the Central Bank of Iran and other Iranian banks to conceal transactions of sanctioned parties, the deficiencies in Iran's anti-money laundering regime and the weaknesses in its implementation").

The ownership structure of the assets at issue in this litigation aptly demonstrates the lengths to which Iran goes in order to conceal its transactions from United States authorities. The $1.75 billion in registered federal government bonds was held by a New York bank in a custodial omnibus account that was maintained by a Luxembourg-based financial intermediary, in part, on behalf of an Italian bank, which had received the assets from Bank Markazi, the Central Bank of Iran, which is wholly owned by the Government of Iran. *See* Pet. App. 58a-62a. The transaction spanned four banks across three continents. The complexity of modern international banking is difficult to overstate. In every transaction, there may be, and often are, many stakeholders whose identities are not readily ascertainable. In the sensitive field of foreign relations, while Congress may delegate broadly, it must legislate narrowly to offer courts clarifying guidance regarding this sensitive subject matter. *See Zemel v. Rusk*, 381 U.S. 1, 17 (1965).

C. Section 8772 is Not Unconstitutional Merely Because it Applies to a Limited Class of Pending Cases.

Section 8772 is not unconstitutional just because it has a narrow application; the sensitive subject matter of the statute necessarily requires a narrow reach. Outstanding judgments by nationals of one country against the government of another are a delicate matter of foreign policy in a typical situation. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 430 (1964). But when the outstanding judgments stem from personal injury or death caused by terrorist attacks, and the two nations involved have had no diplomatic relations in over thirty years, the complexity and sensitivity is further heightened. In this context, the political branches must have discretion "to apply a remedy to a case as it may arise." *Dames & Moore v. Regan*, 453 U.S. 654, 677 (1981).

Congress can enact a statute that clarifies the law applicable to a limited class of pending cases. *Axel Johnson, Inc. v. Arthur Anderson & Co.*, 6 F.3d 78 (2d Cir. 1993). This is especially true in cases concerning sensitive issues of foreign relations with hostile states. Section 8772 does not change the law for a single favored plaintiff, as petitioner contends, but rather changes the applicable law for a limited class of cases all stemming from Iranian-sponsored terrorist attacks.

The reference to specific proceedings by name in § 8772(b) does not limit the application of the statute to a single plaintiff; it merely identifies the specific assets to which the new statute applies. 22 U.S.C. § 8772(b). In *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), this Court held that the express reference in a statute to two pending cases, identified by name and caption number, was not a separation of powers violation. Rather, it "served only to identify the 'five statutory requirements that [were] the basis for' those cases." *Id.* at 440 (internal citations omitted).

Here, the express reference to "Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)" in § 8772(b) similarly serves to identify the assets to which the statute applies. This is both permissible and reasonable, as including a description of the complex assets contemplated by the statute would be lengthy at best. At worst, it could be vague and cause adverse foreign policy consequences when applied to unanticipated situations.

Section 8772 is not a "one-case-only regime" (Pet. Br. 26), but applies to a limited class of outstanding judgments already entered against Iran. Section 8772(c) provides that the statute applies to the "proceedings referred to in subsection (b)[,]" expressly extending to several *proceedings*, not a single *proceeding*. 22 U.S.C. § 8772(c). Rather than write out each of the potential qualifying judgments, Congress limited the applicability to § 8772 by a shorthand reference to the case into which all the judgments

had been, or would be, consolidated for purposes of execution.[13]

CONCLUSION

Compensating victims of terrorism with assets in which Iran, a state sponsor of terrorism, has a beneficial interest serves important national security and foreign policy goals. First, such enforcement measures hold Iran accountable for sponsoring terrorist attacks. Second, the victims of terrorism and their families are compensated for their injuries or wrongful death. When the Bank Markazi bonds were blocked by the President, Congress enacted § 8772 to clarify the scope of the TRIA as it applies to these complex assets, mindful of the fact that leaving the assets to languish in a bank account did not accomplish either objective. As such, Congress made clear that if the court finds Iran has a beneficial interest in these assets, they should be subject to attachment in satisfaction of outstanding terrorism judgments consolidated in this action. Enforcing plaintiffs' judgments will provide some minimum closure and compensation to victims and surviving family members, many of who have waited for over thirty years for a measure of justice. Finally, it will encourage other

[13] The list of parties covered by these eighteen judgments spans over thirteen pages in petitioner's appendix. Pet. App. 130a-144a.

victims of terrorism to bring similar lawsuits against terrorist states.

These significant foreign policy and national security considerations distinguish § 8772 from the exclusively domestic statute invalidated in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). Balancing Congress's extremely high interest in holding Iran accountable for financing terrorist attacks and deterring its future sponsorship of such acts, against petitioner's interest in avoiding responsibility for paying these judgments, § 8772 does not violate separation of powers. Finally, § 8772 is an integral part of a coordinated effort by the political branches to regulate the foreign assets of Iran, a state sponsor of terrorism, to advance vital national security interests, and should not be undermined by the judiciary.

The decision of the Second Circuit Court of Appeals judgment should be affirmed.

December 21, 2015 Respectfully submitted,

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DEC 23 2015

No. 14-770

In the

Supreme Court of the United States

BANK MARKAZI,
THE CENTRAL BANK OF IRAN,

Petitioner,

v.

DEBORAH D. PETERSON, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CURRENT UNITED STATES SENATORS SHELDON WHITEHOUSE, LINDSEY O. GRAHAM, TED CRUZ, AND CHRISTOPHER A. COONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 8

I. **In conferring authority on courts to attach assets of a state sponsor of terrorism, Congress is entitled to deference.** 8

II. **Congress, the Executive, and the courts have all determined that Iran was responsible for the terrorist attacks that resulted in liability in this case.** .. 14

III. **At the forefront of combatting terrorist financing, Congress has abrogated sovereign immunity for state sponsors of terrorism and created express causes of action and remedies against them.** 20

A. **The "Terrorism Exception" to Foreign Sovereign Immunity**

Opened Litigation Against State Sponsors of Terrorism and Their Agencies and Instrumentalities. 21

B. The Flatow Amendment Tries, But Fails, to Create a Federal Cause of Action Against State Sponsors of Terrorism. 23

C. Congress Provided a Payment Mechanism for Judgments Against Iran as Far Back as 2000. 25

D. To Clarify the Right to a Cause of Action Against State Sponsors of Terrorism, Congress Voiced this Intention in 2008. 28

E. Congress Has Been Active in Seeking Ways to Permit Damages Recovery for the Victims of State-Sponsored Terrorism. 30

IV. Congress's identification of property of a state sponsor of terrorism as suitable for attachment and execution did not interfere with a final judgment, but merely changed the law governing a collateral proceeding. 32

V. This Court can construe Section 8772 to avoid any constitutional issues. 38

VI. Should the Court determine it is unconstitutional, Subsection 8772(c)(1) is severable. 41

CONCLUSION 42

APPENDIX – *LIST OF AMICI* 44

TABLE OF AUTHORITIES

Page(s)

Cases

Acree v. Republic of Iraq, 370 F.3d 41 (D.C. Cir. 2004) 25

Alaska Airlines, Inc. v. Brock, 480 U.S. 678 (1987) 41

Ashwander v. TVA, 297 U.S. 288 (1936) 38

Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002) 39

Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024 (D.C. Cir. 2004) 24, 28

Dames & Moore v. Regan, 453 U.S. 654 (1981) 37

Estate of Heiser v. Islamic Republic of Iran, 466 F. Supp.2d 229 (D.D.C. 2006) 18, 19

Farrakhan v. Reagan, 669 F. Supp. 506 (D.D.C. 1987), *aff'd without opinion*, 851 F.2d 1500 (D.C. Cir. 1988) 8

Glidden Co. v. Zdanok, 370 U.S. 530 (1962) 10

Greenbaum v. Islamic Republic of Iran, 451 F. Supp.2d 90 (D.D.C. 2006) 19

Hegna v. Islamic Republic of Iran, 376 F.3d 226 (4th Cir. 2004)..... 36, 37

Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).....passim

Holland v. Islamic Republic of Iran, 496 F. Supp. 2d 1 (D.D.C. 2005)..... 5, 16, 17

Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. 2000)..... 12

Jones v. United States, 529 U.S. 848 (2000) 38

Kilburn v. Socialist People's Libyan Arab Jamahiriya, 376 F.3d 1123 (D.C. Cir. 2004) .. 11, 24

Leibovitch v. Islamic Republic of Iran, 697 F.3d 561 (7th Cir. 2012)..... 23, 29

NML Capital, Ltd. v. Banco Cent. De La Republica Argentina, 652 F.3d 172 (2d Cir. 2011)..... 36

Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856)..... 7, 34

Peterson v. Islamic Republic of Iran, 264 F. Supp.2d 46 (D.D.C. 2003)..... 17

Plaut v. Spendthrift Farm, 514 U.S. 211 (1995) .....passim

Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82 (D.C. Cir. 2002) 23

Regan v. Time, Inc., 468 U.S. 641 (1984) 41

Regan v. Wald, 468 U.S. 222 (1984) 11

Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (1992) 32, 33, 34, 35

Ross v. Peck Iron & Metal Co., 264 F.2d 262 (4th Cir. 1959) 35

Strauss v. Credit Lyonnais, S.A., 249 F.R.D. 429 (E.D.N.Y. 2008) 4

Swift & Co. Packers v. Compania Columbiana Del Caribe, S.A., 339 U.S. 684 (1950) 7, 32

United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004) 12

United States v. Klein, 80 U.S. (13 Wall.) 128 (1872) 33

Wultz v. Islamic Republic of Iran, 864 F. Supp. 2d 24 (D.D.C. 2012) 40

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 10, 37

Zemel v. Rusk, 381 U.S. 1 (1965) 11

Statutes

22 U.S.C. § 8772 ..... passim

22 U.S.C. § 8772(a)(1) 31

22 U.S.C. § 8772(a)(2) 31, 40

22 U.S.C. § 8772(b) 39

22 U.S.C. § 8772(c)(1) ..... passim

28 U.S.C. § 1605(a)(7) ..... passim

28 U.S.C. § 1605A 6, 28, 29

Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132, 110 Stat. 1214 (1996) ..... passim

Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8701 *et seq.* 6, 30

National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, 122 Stat. 3 (Jan. 28, 2008) 28

National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (2008) ... 6

Terrorism Risk Insurance Act of 2002. Pub. L. 107-297, 116 Stat. 2322 (Nov. 26, 2002) 26, 27

Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, 114 Stat. 1464 (Oct. 28, 2000) 25

Other Authorities

"Comprehensive Antiterrorism Act of 1995," 104 H. Rpt. 383 (Dec. 5, 1995) 22

"Enforcement Information for January 23, 2014," U.S. Dep't of Treasury, https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20140123_clearstream.pdf (last accessed Dec. 17, 2015) ... 12

"Find Beirut Barracks Bombing Military Casualties (U.S.)," http://peacetime-casualties.mooseroots.com/d/a/Beirut-Barracks-Bombing (last visited Dec. 4, 2015) 15

"Justice of Victims of Terrorism Act," 106 H. Rpt. 733 (July 13, 2000) 25, 26

"Terrorism Prevention Act," 104 H. Rpt. 518 (Apr. 15, 1996) 22

"Terrorism Risk Insurance Act of 2002," 107 H. Rpt., 779 (Nov. 13, 2002) 27

104 H. Rpt. 863 (1996) 24

13 Moore's Federal Practice § 64.13(2)(b) (2015) .. 35

153 Cong. Rec. S10793 (Aug. 2, 2007)..... 4, 5, 13, 29

154 Cong. Rec. S54 (daily ed. Jan. 22, 2008) 30

1997 Omnibus Consolidated Appropriations Act, Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996) 23

Fed. R. Civ. P 69(a)(1) (2015)..... 35

Fed. R. Civ. P. 69(a)(2) (2015)..... 36

Federalist No. 23 (Clinton Rossiter ed., 1961)..... 10

Federalist No. 41 (Clinton Rossiter ed., 1961)..... 9

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International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 229..... 6

Senator Evan Bayh, *The Role of Charities and NGOs in the Financing of Terrorist Activities*, U.S. Senate Committee on Banking, Housing,

and Urban Affairs, Subcommittee on International Trade and Finance, Aug. 1, 2003 4

U.N. Security Council Resolution 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001)..... 13

INTEREST OF *AMICI CURIAE*[1]

This brief *amicus curiae* is respectfully submitted by Senator Sheldon Whitehouse (D-RI), Senator Lindsey Graham (R-SC), Senator Ted Cruz (R-TX), and Senator Christopher A. Coons (D-DE).

Amici completely and enthusiastically support the brief submitted by the full Senate. They submit this additional *amicus curiae* brief as members of the Legislative Branch responsible, through specific Judiciary Committee responsibilities, for overseeing Congress's actions in this area. Specifically, *amici* have been an active part of the effort to seek justice for United States nationals against state sponsors of terrorism in providing both causes of action for these victims and procedures for collection of damages awards in federal courts. *Amici* have participated in hearings and briefings on threats posed by state sponsors of terrorism. To inform their deliberations on this challenging subject, they have elicited a wide range of views from academic experts, concerned citizens and organizations, and members of the executive branch, including officials from the Office of the

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party or any other person other than *amici curiae*, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties' consents are on file or are being lodged herewith.

President of the United States and the Departments of Justice, State, Defense, Treasury, Commerce, and Homeland Security. *Amici* regard the legislation at issue here as a vital step in the ongoing struggle to hold state sponsors of terrorism accountable.

Members of the United States Senate are particularly well qualified to inform this Court about the exercise of Congress's Article I power to promote accountability for state sponsors of terrorism and the intent behind legislation enacted to promote such accountability. A ruling against the respondents in this case could call into question other important foreign affairs legislation, including other portions of Congress's carefully calibrated exceptions to the Foreign Sovereign Immunities Act. *Amici* believe that injecting additional uncertainty into the already turbulent atmosphere of foreign affairs would impede the United States' ability to protect its own nationals in countries around the globe.

SUMMARY OF ARGUMENT

Few matters that elicit legislators' attention are more important than coping with the threat of transnational terrorism. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (describing combating terrorism as "an urgent objective of the highest order"). The legislation at issue in this case

provides new tools to courts to hold state sponsors of terrorism accountable. Those tools change the law governing traditionally modifiable remedies such as attachment and execution on judgments. *See* 22 U.S.C. § 8772 (authorizing attachment and execution regarding U.S. assets in which Islamic Republic had beneficial interest). In enacting those changes, Congress did not interfere impermissibly with final judgments on the merits; rather, Congress sought only to ensure that victims of terrorism can recover on the judgments they obtain.

The legislation at issue here is not Congress's first attempt to hold state sponsors of terrorism accountable. Congress has over time constructed an elaborate latticework of legislation to accomplish this result. This legislation, like Congress's other enactments in this challenging arena, aims to achieve two results: bring transparency to opaque financial dealings of state sponsors of terrorism that such states use to hide their assets, and ensure that those assets are available to satisfy judgments obtained by victims of terrorism.

Congress should receive deference in addressing this complex, dynamic aspect of U.S. foreign affairs. As this Court has noted, "national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to

obtain and the impact of certain conduct difficult to assess." *Humanitarian Law Project*, 561 U.S. at 34. Congress's efforts to navigate these tempestuous waters are "entitled to deference." *Id.* at 33.

Legislators recognize that "[c]utting off the financing of terrorist organizations is a critically important component of the war against terror." *See Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429, 445 (E.D.N.Y. 2008), citing Senator Evan Bayh, *The Role of Charities and NGOs in the Financing of Terrorist Activities*, U.S. Senate Committee on Banking, Housing, and Urban Affairs, Subcommittee on International Trade and Finance, Aug. 1, 2003, at 1-2. Congress has faced particularly onerous challenges in holding state sponsors of terrorism accountable. The financial transactions used by state sponsors are often opaque. As a distinguished sponsor of legislation to promote accountability observed, "[C]urrent law permits ... terrorist states to hide their assets from the victims who have successful judgments against them." 153 Cong. Rec. S10793 (Aug. 2, 2007) (Sen. Lautenberg).

Both terrorist groups and their state enablers often engage in deception to keep the United States and its allies off-balance. *See Humanitarian Law Project*, 561 U.S. at 31 (citing study finding that "terrorist groups systematically conceal their activities behind charitable, social, and political

fronts"). For over thirty years, Iran has endeavored to conceal its role in the 1983 Beirut Marine barracks bombing. *See Holland v. Islamic Republic of Iran*, 496 F. Supp. 2d 1, 8 (D.D.C. 2005) (finding that Iran used its secret police as "vital conduit for Iran's provision of funds to Hezbollah, providing explosives ... and ... exercising near-complete operational control" in operations such as 1983 Beirut attack). Iran and other state sponsors of terrorism also play a shell game with their U.S. assets, attempting to conceal them by arranging for others to hold title while Iran retains a beneficial interest. *See* 153 Cong. Rec. S10793 (Aug. 2, 2007) (Sen. Lautenberg) (explaining that law changed by instant legislation allowed state sponsors to conceal ownership by delegating "day-to-day managerial control" to others while continuing to reap financial benefits).

Congress has acted repeatedly to reckon with the deceptive tactics of the Iranian regime. In 1996, as part of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Congress carved out an exception to sovereign immunity for designated state sponsors of terrorism who commit terrorist acts or provide material support and "resources" to an individual or entity that commits a terrorist act that "results in the death or personal injury of a United States citizen." *See* Pub. L. 104-132, Title II, § 221(a) (April 24, 1996), 110 Stat. 1214, codified at

28 U.S.C. § 1605 (West Supp. 1997). This statute was followed by other legislation that addressed new or lingering gaps in the fabric of accountability. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2008 (2008 NDAA), Pub. L. No. 110-181, § 1083, 122 Stat. 3, adding new 28 U.S.C. § 1605A (providing express right of action against state sponsors of terrorism). The legislation at issue here adjusted the law governing available remedies such as attachment. In the statute, Congress identified certain lucrative properties held by others on Iran's behalf as subject to attachment or execution by victims of terrorism who had obtained judgments against Iran because of that country's track record of sponsorship of terrorism. *See* Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8701 *et seq.*

In acting to provide transparency and accountability regarding state sponsors of terrorism, Congress has not only assisted terrorism's victims; it has also furthered international cooperation in the curbing of financial support for terrorism. *See Humanitarian Law Project*, 561 U.S. at 32 (noting U.S. interest in "cooperative efforts between nations to prevent terrorist attacks"); *cf. Strauss*, 249 F.R.D. at 452 (noting that U.S., along with France and other nations, is a signatory to the United Nations International Convention for the Suppression of the Financing of Terrorism, which requires cooperation

in criminal matters, and that civil actions to enhance financial transparency and compensate victims are "not inconsistent with ... interests in international cooperation to detect and fight ... the financing of global terror").

Congress's changes to law governing inherently modifiable remedies such as attachment and execution do not impermissibly interfere with final judgments on the merits. Courts have traditionally viewed remedies like attachment and execution as "collateral" to the merits, designed to ensure that adjudication on the merits was not an "empty rite." *Swift & Co. Packers v. Compania Columbiana Del Caribe, S.A.*, 339 U.S. 684, 688-89 (1950). Changes to the operation of such "continuing," "executory" remedies are permissible changes made by a "competent authority," not impermissible trenching on final judgments. *See Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431-32 (1856). That analysis applies even when legislation addresses a specific lawsuit. *See Plaut v. Spendthrift Farm*, 514 U.S. 211, 232 (1995) (explaining legislation at issue in *Pennsylvania & Wheeling*, which curbed ongoing equitable relief in specific litigation, as merely modifying "the prospective effect of injunctions"). The separation of powers does not preclude Congress's calibration of these remedies to promote the accountability of state sponsors of terrorism.

ARGUMENT

I. IN CONFERRING AUTHORITY ON COURTS TO ATTACH ASSETS OF A STATE SPONSOR OF TERRORISM, CONGRESS IS ENTITLED TO DEFERENCE.

This Court has repeatedly accorded deference to Congress's considered judgments in the fluid realm of foreign affairs. In *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), the Court acknowledged Congress's need to act with imperfect information in the global arena. *Id.* at 34 (noting that "national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess"). In this case as in the case law, Congress's evaluation of inherently imperfect information from overseas "is entitled to deference." *Id.* at 33.

Deference is particularly apt when Congress seeks to curb the threat posed by state sponsors of international terrorism. See *Farrakhan v. Reagan*, 669 F. Supp. 506, 510 (D.D.C. 1987), *aff'd without opinion*, 851 F.2d 1500 (D.C. Cir. 1988) (in decision upholding bar under International Emergency Economic Powers Act on provision of money to agent

of Libyan regime, recognizing "compelling interest in national security and the end of Libya's alleged participation in 'state-sponsored' terrorism"). A deferential posture helps Congress legislate confidently in this murky domain.

This deferential stance is rooted in the Framers' understanding of the political branches' responsibility and expertise in matters involving foreign affairs. The Preamble to the Constitution famously declares that the framework outlined therein was necessary to "provide for the common defence." In Federalist No. 41, Madison affirmed that "security against foreign danger is ... an avowed and essential object" of American constitutional governance. *See Federalist No. 41*, at 256 (Clinton Rossiter ed., 1961); *see also Humanitarian Law Project*, 561 U.S. at 40 (citing these sources). Madison also noted the risks that arise because the U.S. cannot "chain the ambition or set bounds to the exertions of all other nations." *Federalist No. 41*, at 257

Realization of the Framers' goals requires that the "powers requisite for attaining [national security] must be *effectually* confided" to the federal government. *Federalist No. 41*, at 256 (emphasis added). Without a measure of deference that ensured the agility of the political branches, the gravity and frequency of foreign challenges would

have overwhelmed the new republic. Acknowledging this practical reality, Hamilton observed that, "*it is impossible to foresee or to define the extent and variety of national exigencies, and the corresponding extent and variety of the means which may be necessary to satisfy them.*" *Federalist No. 23*, at 153 (emphasis in original); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government"); *Glidden Co. v. Zdanok*, 370 U.S. 530, 547 (1962) (in analysis of precedent on Congress's power to establish non-Article III tribunals, Justice Harlan concluded that Chief Justice Marshall was "conscious of his responsibility to see the Constitution *work*", and therefore read Article III to provide the "flexibility" necessary to deal with the special challenges posed by U.S. territories abroad) (emphasis added).

This Court has not hesitated to implement the Framers' vision. For the seventy years since the end of World War II, this Court has stressed the need for deference to Congress in meeting external threats. In upholding a ban on U.S. persons' travel to Communist Cuba, the Court observed that, "because of the changeable and explosive nature of contemporary international relations, Congress ...

must of necessity paint with a brush broader than that it customarily wields in domestic areas." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). Courts are ill-suited to assessing the myriad factors that Congress considers in this sphere. As this Court has admitted, Congress has a significant institutional advantage over the courts in assessing the need for action. *Humanitarian Law Project*, 561 U.S. at 34 (explaining that, "when it comes to collecting evidence and drawing factual inferences in this area, 'the lack of competence on the part of the courts is marked'") (citation omitted).

Congress has a particular advantage over courts in crafting curbs to financial support for regimes that foster terrorism and other unlawful violence. In *Regan v. Wald*, 468 U.S. 222, 243 (1984), the Court concluded that Congress could limit travel to Cuba to "curtail the flow of hard currency" that fueled the regime's campaign of violence and subversion abroad. In *Humanitarian Law Project*, this Court expressly noted that tracing the serpentine movements of terrorist funding is an accountant's nightmare. *See Humanitarian Law Project*, 561 U.S. at 29 (voicing doubt that "foreign terrorist organizations meaningfully segregate support of their legitimate activities from support of terrorism"); *see also Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1130 (D.C. Cir. 2004) ("terrorist organizations can hardly be

counted on to keep careful bookkeeping records"); *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000) ("terrorist organizations do not maintain open books"); *cf. United States v. Hammoud*, 381 F.3d 316, 329 (4th Cir. 2004) (citing opaque terrorist accounting methods in holding that proof of specific intent to aid violence is not required for criminal conviction based on defendant's financial contribution to Hezbollah).

The concealment of Bank Markazi's assets in the United States was illuminated by the sanctions issued by the Office of Foreign Assets Control against Clearstream Banking, S.A. In the Clearstream Banking, S.A. case, Bank Markazi manipulated the American banking system using Clearstream as an intermediary to maintain nearly $3 billion in securities for the ultimate beneficial ownership of Bank Markazi in violation of the sanctions regime initiated against Iran and Bank Markazi. *See* "Enforcement Information for January 23, 2014," U.S. Dep't of Treasury, https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20140123_clearstream.pdf (last accessed Dec. 17, 2015). Through various transactions, Clearstream enabled Bank Markazi's interest in the securities to be "buried one layer deeper in the custodial chain." *Id.* The accounts maintained by Clearstream for the ultimate benefit

of Bank Markazi in part drove the enactment of the legislation at issue in this case.

Because of the difficulty of monitoring financial and in-kind services to terrorist groups, this Court has wisely deferred to Congress's judgment that, "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." See AEDPA § 301(a)(7).[2]

The same calculus should apply here. Congress has repeatedly noted that state sponsors of terrorism seek to hide both the money trail that leads to violence and the assets that fuel this aid. *See* 153 Cong. Rec. S10793 (Aug. 2, 2007) (Sen. Lautenberg) (noting that bill that ultimately became law providing right of action for U.S. victims suing state sponsors of terrorism authorized the "seizure

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[2] Financial assistance to terrorist groups has also elicited international concern. *See* U.N. Security Council Resolution 1373, U.N. Doc. S/RES/1373, p. 1(d) (Sept. 28, 2001) (declaring that, "states are required to prohibit anyone within their personal or territorial jurisdiction from making any funds, resources or financial services available to persons who commit terrorist acts or to entities controlled by them"); Financial Action Task Force on Money Laundering, Special Recommendations on Terrorist Financing 2 (2008), http://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Standards%20-%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf (last visited Dec. 22, 2015) (noting importance of international cooperation).

of hidden commercial assets belonging to the terrorist state"). Facilitating accountability in the face of such subterfuge requires vigilance and constant upgrades in the tools for the job. A measure of deference is necessary for Congress to continue this crucial work.

II. CONGRESS, THE EXECUTIVE, AND THE COURTS HAVE ALL DETERMINED THAT IRAN WAS RESPONSIBLE FOR THE TERRORIST ATTACKS THAT RESULTED IN LIABILITY IN THIS CASE.

In addition to providing deference to Congress in its attempts to facilitate state-sponsor accountability through legislation, this Court must also take note of the fact that Congress speaks on behalf of its stakeholders – the American people. The victims of the state-sponsored terrorist acts at issue in this case are United States nationals who were killed or injured in terrorist attacks ranging from the 1983 bombing of the U.S. Marine Barracks in Beirut, Lebanon to the 1996 Khobar Towers bombing in Dhahran, Saudi Arabia to the August 2001 suicide bombing of a Sbarro Pizzeria in Jerusalem, Israel and beyond. In each of these instances, the federal courts have determined that Iran was responsible for these attacks which led to

death or injury to literally hundreds of United States nationals.

In a case arising out of the bombing of the 1983 Marine Barracks bombing, the district court described the attack:

> This action arises from the most deadly state-sponsored terrorist attack against American citizens prior to September 11, 2001 – the October 23, 1983 Marine barracks bombing in Beirut, Lebanon, during which 241 American servicemen[3] acting as part of a multinational U.N.-authorized peacekeeping force were murdered in their sleep by a suicide bomber. Twenty-eight year-old Petty Officer Robert S. Holland, son of Charles and Rosemary Holland, brother of Patrick Holland, husband of Donna Marie Holland, and father of James Robert and Chad Phillip Holland ..., was one of these unfortunate victims, killed while serving his country and

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[3] The 241 killed servicemen were residents of 34 different states and Puerto Rico including residents of Rhode Island, South Carolina, and Texas. *See* "Find Beirut Barracks Bombing Military Casualties (U.S.)," http://peacetime-casualties.mooseroots.com/d/a/Beirut-Barracks-Bombing (last visited Dec. 4, 2015).

> upholding the greater cause of regional peace and stability. Due to the nature and force of the explosion, the Holland family suffered through two more agonizing weeks of waiting until Robert Holland was conclusively identified as "killed in action."

Holland v. Islamic Republic of Iran, 496 F. Supp.2d 1, 4 (D.D.C. 2005). The district court's findings of fact in *Holland* included findings that: "the government of Iran framed the primary objective of Hezbollah: to engage in terrorist activities in furtherance of the transformation of Lebanon into an Islamic theocracy modeled after Iran" (496 F. Supp.2d at 8); "the formation and emergence of Hezbollah as a major terrorist organization was due to the government of Iran" (*Id.*); "almost since its founding, the Iranian government has provided Hezbollah with roughly $100 million per annum in financing, and has also provided it with arms, training, and strategic planning in its operations against the United States and Israel" (*Id.*); the Iranian Ministry of Information and Security "was a vital conduit for Iran's provision of funds to Hezbollah, providing explosives to Hezbollah, and – at all times relevant to these proceedings – exercising near-complete operational control over Hezbollah" (*Id.*); "the government of Iran actually purchased the explosive materials used in the

operation from the government of Bulgaria and then provided the explosives to Hezbollah" (*Id.* at 9); the Iranian government and its agencies "provided complete financial support for the operation, going so far as to use the Iranian embassy in Damascus to cash various checks to provide funding for Hezbollah" (*Id.*); and "Iran provided Hezbollah with virtually all of its operational training" (*Id.*).[4]

In short, the Iranian role in the 1983 Marine Barracks bombing was undeniable and unmistakable. Congressional action on behalf of the 241 U.S. servicemen killed in the bombing to obtain accountability against Iran for its decisive role in the bombing was within its constitutional mandate. The victims of the 1983 Marine Barracks bombing who have obtained judgments against Iran are among the Respondents before the Court in this case.

Other Respondents before this Court are the victims of the June 25, 1996 bombing of the Khobar Towers complex in Dhahran, Saudi Arabia. The explosion resulted in the death of 19 U.S. Air Force

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[4] *Accord Peterson v. Islamic Republic of Iran*, 264 F Supp.2d 46, 58 (D.D.C. 2003) ("Hezbollah and its agents received massive material and technical support from the Iranian government. The sophistication demonstrated [in the attack on the Marine Barracks] and the devastating effect of the detonation ... [indicate] that it is highly unlikely that this attack could have resulted in such loss of life without the assistance of regular military forces, such as those of Iran.").

personnel and injury to hundreds more. *See Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp.2d 229, 252 (D.D.C. 2006). The findings of fact issued by the district judge in *Heiser* included the following:

- Iranian Revolutionary Guard Corps ("IRGC") Brigadier General Ahmed Sharifi "planned the operation and recruited individuals for the operation at the Iranian embassy in Damascus, Syria." 466 F. Supp.2d at 252.

- The bomb used in the attack was assembled at a terrorist base in the Bekaa Valley in Lebanon that was jointly operated by the IRGS and Hezbollah. *Id.*

- "The terrorist attack on the Khobar Towers was approved by Ayatollah Khamenei, the Supreme leader of Iran at the time. It was also approved and supported by the Iranian Minister of Intelligence and Security ... at the time, Ali Fallahian, who was involved in providing intelligence security support for the operation. Fallahian's representative in Damascus, a man named Nurani, also provided support for the operation." *Id.*

- Individuals arrested following the bombing who admitted complicity in the attack "stated that IRGC directed, assisted, and oversaw the

surveillance of the Khobar Towers site, and that these surveillance reports were sent to IRGC officials for their review." *Id.*

The Respondents in this case also include the family of Judith Greenbaum who was killed when a Hamas suicide bomber entered a Sbarro Pizzeria in Jerusalem, Israel on August 9, 2001 and detonated the bomb that was enclosed in the guitar that he was carrying. The findings of fact in *Greenbaum v. Islamic Republic of Iran*, 451 F. Supp.2d 90 (D.D.C. 2006), include reference to the 15 deaths and over 130 injuries caused in this bombing. 451 F. Supp.2d at 96. The findings also stated that "Iran actively provided material support to Hamas during the period immediately preceding the attack." *Id.* at 97 Mrs. Greenbaum was a resident of New Jersey who was planning to return home only days after the bombing. *Id.* at 96.

The examples of the 1983 Marine Barracks bombing, the 1996 Khobar Towers bombing, and the 2001 Sbarro Pizzeria bombing demonstrate the level of complicity of Iran in these acts of terrorism against United States nationals – both military personnel and American civilians – which prompted action by the United States Congress to (1) create a cause of action against state sponsors of terrorism in 1996; and (2) continue to amend those causes of action to allow the victims to obtain compensation –

both compensatory and punitive – against the actual state sponsors and to create mechanisms for the victims to attach assets of the state sponsors that might be used to pay these damages awards.

III. AT THE FOREFRONT OF COMBATTING TERRORIST FINANCING, CONGRESS HAS ABROGATED SOVEREIGN IMMUNITY FOR STATE SPONSORS OF TERRORISM AND CREATED EXPRESS CAUSES OF ACTION AND REMEDIES AGAINST THEM.

To hold state sponsors of terrorism accountable and combat the threat that these states posed to United States nationals abroad, Congress abrogated the sovereign immunity of state sponsors such as Iran. That legislative abrogation entailed a cause of action for terrorist attacks in which United States nationals were killed or injured. The victims of these attacks or their survivors could seek redress in federal court against specific foreign states previously designated by the Executive Branch as sponsors of terrorism. The "terrorism exception" to foreign sovereign immunity has since been expanded by Congress to fully effectuate the congressional goal of holding such state sponsors of terrorism responsible *financially* for the casualties they have directly and indirectly inflicted upon United States nationals such as those in the 1983

Marine Barracks bombing, the 1996 Khobar Towers bombing, and the 2001 Jerusalem Sbarro bombing. The ability to attach assets and collect upon judgments against these state sponsors of terrorism led to the passage of the statute at issue in this case in an effort to permit actual recovery of damages for United States national victims of state-sponsored terrorism committed by the Islamic Republic of Iran.

A. The "Terrorism Exception" to Foreign Sovereign Immunity Opened Litigation Against State Sponsors of Terrorism and Their Agencies and Instrumentalities.

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was signed into law. *See* AEDPA, Pub. L. 104-132 (Apr. 24, 1996), 110 Stat. 1214. Section 221 of the AEDPA enacted 28 U.S.C. § 1605(a)(7) which abrogated foreign sovereign immunity for states designated as state sponsors of terrorism under "section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act" in cases "in which money damages are sought against a foreign state of personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage

taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act of provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency." AEDPA § 221(a)(1)(C), 110 Stat. at 1241.

AEDPA was enacted, in part, to "deter terrorism." 110 Stat. at 1214. The "terrorism exception," as 28 U.S.C. § 1605(a)(7) came to be known, was enacted under the heading of "Jurisdiction for Lawsuits Against Terrorist States." 110 Stat. at 1241. The congressional purpose for this legislation was set forth in the conference committee report issued on April 15, 1996 which stated that Section 1605(a)(7) "permits U.S. federal courts to hear claims seeking money damages for personal injury or death against such nations and arising from terrorist acts they commit, or direct to be committed, against American citizens or nationals...." "Terrorism Prevention Act," 104 H. Rpt. 518 (Apr. 15, 1996). A prior House report on the legislation stated that Section 1605(a)(7) would "amend the Foreign Sovereign Immunities Act so as to grant federal court jurisdiction over cases brought by U.S. citizens seeking damages against a foreign state for certain acts." "Comprehensive Antiterrorism Act of 1995," 104 H. Rpt. 383 (Dec. 5, 1995).

The legislative history demonstrated the congressional intent to create federal jurisdiction for suits against the actual state sponsors of terrorism; however, the courts determined that it was unclear whether Section 1605(a)(7) created a federal cause of action against foreign state sponsors of terrorism. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 87 (D.C. Cir. 2002); *see also Leibovitch v. Islamic Republic of Iran*, 697 F.3d 561, 564 (7th Cir. 2012). Nevertheless, not long after the enactment of AEDPA, a second statutory provision was enacted.

B. The Flatow Amendment Tries, But Fails, to Create a Federal Cause of Action Against State Sponsors of Terrorism.

On September 30, 1996, a provision subsequently known as the "Flatow Amendment" was enacted as part of the 1997 Omnibus Consolidated Appropriations Act, Pub. L. 104-208, § 589, 110 Stat. 3009-172 (Sept. 30, 1996). The Flatow Amendment states:

> An official, employee, or agent of a foreign state designated as a state sponsor of terrorism designated under section 6(j) of the Export Administration Act of 1979 while

> acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) of title 28, United States Code for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7).

The congressional report on the legislation makes clear that the language of the Flatow Amendment was meant to "expand[] the scope of monetary damage awards available to American victims of international terrorism." *See* 104 H. Rpt. 863, 987 (1996). While Congress enacted the Flatow Amendment to create a federal cause of action against foreign state sponsors of terrorism, the D.C. Circuit nevertheless held that, based on strict statutory interpretation, the Flatow Amendment "does not authorize a cause of action against *foreign states*." *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1032 (D.C. Cir. 2004) (emphasis added); *see also Kilburn v. Socialist People's Libyan*

Arab Jamahiriya, 376 F.3d 1123, 1133 (D.C. Cir. 2004); *Acree v. Republic of Iraq*, 370 F.3d 41, 43 (D.C. Cir. 2004).

While it took nearly eight years for the Flatow Amendment to be interpreted as not having provided a cause of action against the actual foreign state sponsors of terrorism, Congress passed additional legislation in the intervening time period to permit recovery on judgments obtained against these state sponsors.

C. Congress Provided a Payment Mechanism for Judgments Against Iran as Far Back as 2000.

On October 28, 2000, Congress enacted the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, 114 Stat. 1464 (Oct. 28, 2000). Section 2002 of this law provided for "Payment of Certain Anti-Terrorism Judgments" and specifically judgments against Iran under the terrorism exception. In the House Report on the "Justice of Victims of Terrorism Act" – which was subsequently included in part within Section 2002 – issued on July 13, 2000, Congress set forth numerous examples of Iranian state-supported terrorism against United States nationals resulting in large damages awards in federal courts. *See* "Justice of Victims of Terrorism Act," 106 H. Rpt. 733 (July 13, 2000). The

report found that "[t]he President's continued use of his waiver power has frustrated the legitimate rights of victims of terrorism, and thus this legislation is required. While still allowing the President to block the attachment of embassies and necessary operating assets, H.R. 3485 would amend the law to specifically deny blockage of attachment of proceeds from any property which has been used for any non-diplomatic purpose or of proceeds from any asset which is sold or transferred for value to a third party." *Id.* An attachment to the report further explicitly stated, "H.R. 3485 would enable victims of Iranian terrorism who have won judgments against Iran in U.S. courts to collect monetary damages from that country primarily by obtaining certain funds currently held by the U.S. government." *Id.*

Following the terrorist attacks of September 11, 2001, Congress passed the Terrorism Risk Insurance Act of 2002. Pub. L. 107-297, 116 Stat. 2322 (Nov. 26, 2002). Section 201 of the law – titled "Satisfaction of Judgments from Blocked Assets of Terrorists, Terrorist Organizations, and State Sponsors of Terrorism" – amended the Victims of Trafficking and Violence Protection Act of 2000 provisions vis-à-vis Iran. The law states:

> Notwithstanding any other provision of law, and except as provided in

> subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

116 Stat. at 2337 (§ 201(a)). In enacting this legislation, Congress made clear that its goal was to permit the enforcement of judgments against, *inter alia*, Iran. *See* "Terrorism Risk Insurance Act of 2002," 107 H. Rpt. 779 (Nov. 13, 2002) ("The purpose of Section 201 is to deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism in any court of competent jurisdiction by enabling them to satisfy such judgments through the attachment of blocked assets of terrorist parties. It is the intent of the Conferees that Section 201 establish that such judgments are to be enforced.")

Based on the pattern of legislation, it is clear that the intent of Congress has been to permit United States national victims of state-sponsored terrorism to bring suit against those state sponsors in federal courts and to permit judgments awarded in those cases to be enforced against the state sponsors.

D. To Clarify the Right to a Cause of Action Against State Sponsors of Terrorism, Congress Voiced this Intention in 2008.

Following the D.C. Circuit's decisions in *Cicippio-Puleo* and other cases determining that neither the terrorism exception nor the Flatow Amendment provided a private cause of action against foreign state sponsors of terrorism, Congress acted in January 2008 to clarify its intention that foreign state sponsors of terrorism *are* subject to a specific cause of action in federal courts with punitive damages available for engaging in acts resulting in injury to United States nationals. Section 1083 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, 122 Stat. 3 (Jan. 28, 2008), created an entirely new statutory provision, 28 U.S.C. § 1605A. *See* 122 Stat. at 338. As the Seventh Circuit concluded, "the *Cicippio-Puleo* decision frustrated the goal of deterring state sponsorship of terrorism through massive damages

awards in civil suits." *Leibovitch*, 697 F.3d at 567. Section 1605A both created an explicit cause of action against the foreign states themselves while also providing for punitive damages to be awarded against the state sponsors – something that was previously prohibited by statute. *See* 28 U.S.C. § 1605A.

New Jersey Senator Frank Lautenberg shone a light on these provisions by stating that the new legislation would "allow victims of state sponsored terrorism to have their day in court" and deprive state sponsors of terrorism of "the funds that they use to strike at innocent victims." 153 Cong. Rec. S10793 (daily ed. Aug. 2, 2007). He added that the legislation would "allow for the seizure of hidden commercial assets belonging to the terrorist state." *Id.* Upon the passage of the bill in Congress, Senator Lautenberg made clear the original intent of Congress in 1996 when the AEDPA was passed by saying, "Congress's original intent behind the 1996 legislation has been muddied by numerous court decisions.... [Based on these decisions], judges have been prevented from applying a uniform damages standard to all victims in a single case because a victim's right to pursue an action against a foreign government depends upon State law. My provision [§ 1605A] in this bill fixes this problem by reaffirming the private right of action under the Flatow Amendment against the foreign state

sponsors of terrorism themselves." 154 Cong. Rec. S54 (daily ed. Jan. 22, 2008).

The intent of Congress is clear: state sponsors should be held accountable for terrorist acts against United States nationals and should be deterred from this action by having to pay sizeable damages awards based on litigation arising out of those terrorist acts.

E. Congress Has Been Active in Seeking Ways to Permit Damages Recovery for the Victims of State-Sponsored Terrorism.

Congressional intent to punish and deter state-sponsored terrorism has taken many forms over the past 20 years in terms of permitting causes of action and establishing procedures for collecting on monetary awards against state sponsors of terrorism, including Iran. The Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. 112-158, 126 Stat. 1214 (Aug. 10, 2012), simply furthered the intent of Congress to deter Iran from engaging in state sponsorship of terrorism.

This legislation permitted the attachment of Iranian assets held by the Central Bank of Iran (Bank Markazi) with the conditions that the assets must be: (a) held in the United States for a foreign securities intermediary doing business in the United

States; (b) blocked by the Executive Branch pursuant to executive powers and "identified in and the subject of proceedings in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG), that were restrained by restraining notices and levies secured by the plaintiffs in those proceedings, as modified by court order dated June 27, 2008, and extended by court orders dated June 23, 2009, May 10, 2010, and June 11, 2010, so long as such assets remain restrained by court order"; and (c) "equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran or any agency or instrumentality of that Government, that such foreign securities intermediary or a related intermediary holds abroad." 22 U.S.C. § 8772(a)(1)(A)-(C). To permit such attachment, the court must determine that "Iran holds equitable title to, or the beneficial interest in, the assets" related to the Peterson restraining notices and that "no other person possesses a constitutionally protected interest in" these assets "under the Fifth Amendment to the Constitution of the United States." 22 U.S.C. § 8772(a)(2).

IV. CONGRESS'S IDENTIFICATION OF PROPERTY OF A STATE SPONSOR OF TERRORISM AS SUITABLE FOR ATTACHMENT AND EXECUTION DID NOT INTERFERE WITH A FINAL JUDGMENT, BUT MERELY CHANGED THE LAW GOVERNING A COLLATERAL PROCEEDING.

To effectively promote accountability for state sponsors of terrorism, Congress must ensure that property in the U.S. owned by state sponsors is available to satisfy judgments obtained by the victims of terrorist attacks. The legislation here furthered this goal with guidance to federal courts on the collateral remedies of attachment and execution, which ensure that judgment debtors do not frustrate justice. *See Swift & Co. Packers v. Compania Columbiana Del Caribe, S.A.*, 339 U.S. 684, 688-89 (1950) (attachment is "collateral" remedy to ensure that subsequent adjudication is not an "empty rite"). Congress's change in the contours of these collateral remedies was a permissible change in governing law, *see Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 438-39 (1992), not an impermissible interference with a final judgment.

While Congress cannot alter a final judgment on the merits, *Plaut v. Spendthrift Farm*, 514 U.S.

211, 228 (1995); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1872), Congress is free to change the applicable law that governs a dispute. *See Robertson*, 503 U.S. at 438-39. The case law provides clear examples of the distinction between alteration of a final judgment and mere change in applicable law. In *Plaut*, the Court struck down a law that both changed the statute of limitations for certain securities actions and directed the federal courts to reinstate actions that the courts had already dismissed as time-barred. The Court viewed the second provision as an echo of wholesale state legislative attempts to undermine final judicial judgments during the Articles of Confederation period. *Plaut*, 514 U.S. at 221-22. Justice Scalia, writing for the Court, noted that the Framers had drafted Article III to ward off such encroachments on judicial independence. *See id.* at 221.

In contrast, the *Robertson* Court upheld a law providing that agency management of certain federal lands known to contain spotted owls automatically met federal statutory requirements, even if earlier legislation had imposed a more demanding test for compliance. *See Robertson*, 503 U.S. at 432-33. The Court found that the new statute merely "compelled changes in law, not findings or results under old law." *Id.* at 438. The new statute thus did not undermine judicial independence.

Moreover, to exercise its Article I powers precisely, Congress can tailor statutory text to particular litigation. *Id.* at 440. The statute upheld by the Court in *Robertson* referred to specific lawsuits. The *Robertson* Court found that Congress was fully within its authority in "modifying the provisions at issue" in those pending cases. *Id.*

This Court has placed Congress's modification of the contours of ongoing remedies squarely in the category of permissible changes in governing law. In *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), this Court found that the separation of powers did not bar a statute finding that a bridge at issue in litigation did not obstruct navigation. The legislation enacted by Congress was specifically directed at a court order to abate the bridge and changed the law applicable to this ongoing remedy. *Id.* at 431. Rather than view the statute as an interference with a final judgment, the Court found that the legislation merely entailed the modification of a right by a "competent authority." *Id.* at 431-32. The *Wheeling & Belmont* Court classified the abatement as a decree that was purely "executory" in nature and "continuing," i.e., inherently subject to modification due to findings by the court or other changed circumstances. *Id.* at 431. Based on this analysis, the Court in *Plaut* distinguished the legislation at issue in *Wheeling & Belmont* as a

statute that merely "altered the prospective effect of injunctions," much as Congress modified the environmental law provisions that governed pending cases in *Robertson*. *Plaut*, 514 U.S. at 232.

Just as an injunction is a modifiable decree separable from a final judgment on the merits, attachment and post-judgment execution are collateral remedies that courts modify as needed to ensure that judgment debtors do not move assets to defeat a pending or final judgment. *See 13 Moore's Federal Practice* § 64.13(2)(b) (2015) (describing attachment as "the seizure of defendant's property before judgment ... designed to provide plaintiff with security that the judgment will ultimately be collectible"); Fed. R. Civ. P 69(a)(1) (2015) ("money judgment is enforced by a writ of execution"); *Ross v. Peck Iron & Metal Co.*, 264 F.2d 262, 268 (4th Cir. 1959) ("the chief purpose of attachment proceedings is to secure a contingent lien on the defendant's property until the plaintiff can ... obtain a judgment and have such property applied to [the judgment's] satisfaction").

The remedies of attachment and execution at issue here are inherently subject to modification due to changed circumstances. Consider Rule 69(a)(2) of the Federal Rules of Civil Procedure, which provides that, "In aid of the judgment or execution, the judgment creditor ... may obtain discovery from any

person, including the judgment debtor." Fed. R. Civ. P 69(a)(2) (2015). Under the rule, a judgment creditor's recourse is not limited to property of the judgment debtor that is known to the creditor at the time of the final judgment. The judgment creditor may use discovery to identify other property for attachment or execution. *Cf. Hegna v. Islamic Republic of Iran*, 376 F.3d 226, 230-34 (4th Cir. 2004) (discussing typical process under state law governing execution of judgments). Armed with the fruits of discovery, the judgment creditor can seek modification of either attachment or execution. Indeed, plaintiffs suing sovereign states under the Foreign Sovereign Immunities Act have regularly obtained modification of attachment decrees upon a showing of "an intervening change in circumstances." *See NML Capital, Ltd. v. Banco Cent. De La Republica Argentina*, 652 F.3d 172, 185 (2d Cir. 2011) (citation omitted).

However, adjudication of that request for modification requires additional steps, whether a creditor identifies the property through discovery or Congress designates certain property as subject to attachment or execution. *See Hegna*, 376 F.3d at 234 (observing that, even once property is identified, the "eventual sale of property in satisfaction of the judgment is by no means assured"). A judgment creditor must make further showings to the court, including demonstrating that his or her interest is

superior to that of other creditors. *Id.* In sum, Congress's *authorization* of attachment or execution on particular property is but a step in the process, which requires further showings by the judgment creditor and findings by the court. The further steps required for the actual satisfaction of a judgment demonstrate that Congress's authorization does not interfere with final judgments, but merely changes the law governing such judgments' execution.

This Court, citing the need for deference to the political branches in foreign affairs, has upheld far more sweeping relief than the collateral changes at issue here. In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Court upheld the President's unilateral settlement of state law claims against the Islamic Republic of Iran. In upholding the President's action, the Court indicated that through long-standing practice, Congress had acquiesced in the practice of executive claims settlement. *Id.* at 678-82. Under accepted separation of powers principles, *see Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring), actions authorized by Congress elicit even greater deference than executive actions taken with legislative acquiescence. Here, Congress and the President have spoken with one voice on a weighty foreign affairs issue. If Congress could provide for the settlement of claims against another sovereign state, it can surely change the law

governing ancillary remedies available to claims-holders. Far from threatening judicial authority, Congress has merely strengthened the courts' ability to provide justice.

V. THIS COURT CAN CONSTRUE SECTION 8772 TO AVOID ANY CONSTITUTIONAL ISSUES.

Courts interpret statutes to avoid serious constitutional questions. *See Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring); *cf. Jones v. United States*, 529 U.S. 848, 857 (2000) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided," this Court has a "duty ... to adopt the latter"). The Petitioner maintains that the "rules of construction" in Section 8772(c)(1) limiting Section 8772's availability in "any other action" mean that only parties to this case can benefit from the statute's substantive terms. This reading could raise constitutional questions. However, read in context, the statute potentially benefits other parties. Under the avoidance doctrine, this Court should reject Petitioner's narrow reading and interpret Section 8772 as having broader applicability.

Section 8772(c)(1) is expressly labeled a "rule of construction" directing only how the statute is to be construed. While Petitioner argues that the "rules of construction" in Section 8772(c)(1) limit the statute to this case only, "rules of construction" apply only where there is some ambiguity. When a statute is "unambiguous," the "judicial inquiry is complete" and no other "canon or interpretative tool"—that is, no rule of construction—is required. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002).

That is the case here. Rather than providing that Section 8772 applies only to a single case, Section 8772(c)(1) simply states that the statute should not be "construed" to "affect" the "availability, or lack thereof," of attachment in any other litigation. Another subsection of the statute plainly permits relief for parties besides those in this case, thereby obviating the need to apply Section 8772(c)(1)'s "rules of construction." That saving subsection is Section 8772(b), which allows execution and attachment of assets "identified" in a particular lawsuit. This subsection unambiguously benefits parties with *separate* judgments against Iran based on that country's sponsorship of terrorism. These parties, in addition to parties in the instant case, are free to seek execution and attachment of the identified assets. In fact, the plaintiffs in another such case, *Wultz v. Islamic*

Republic of Iran, 864 F. Supp. 2d 24 (D.D.C. 2012), intervened in this case after enactment of Section 8772 to seek execution on a judgment against Iran arising out of a suicide bombing in Israel in 2006. *See* D.C. Dkt. 329, 330 & Ex. A; D.C. Dkt. 398, at 5-13; Pet. App. 18a-19a. This reading avoids any constitutional problem posed by a statute that only benefits parties to a single case.

Moreover, reading the statute to benefit other parties coincides with congressional intent that Iran's assets be attachable so that "Iran is held accountable for paying the judgments" related to acts of terror. 22 U.S.C. § 8772(a)(2). It makes sense that Congress would draft the statute to be generally applicable to all victims of Iran-sponsored terrorism and not solely to the Respondents in this case. In contrast, reading Subsection 8772(c)(1) to apply only to this case would have the perverse effect of *limiting* the availability of "identified" assets to satisfy judgments obtained against Iran.

Congress's manifest intent to *enhance* relief for state-sponsored terrorism's victims demonstrates the poor fit of Petitioner's reading with the statutory scheme. In contrast, reading the statute to potentially benefit other parties besides those in this case would be entirely consistent with Congress's intent. Under the avoidance doctrine,

this Court could take the latter path in its interpretation of Section 8772.

VI. SHOULD THE COURT DETERMINE IT IS UNCONSTITUTIONAL, SUBSECTION 8772(C)(1) IS SEVERABLE.

If the Court concludes that Subsection 8772(c)(1) must be read to limit the effect of this statute to this case, and concludes that this limitation is unconstitutional, the proper remedy is to sever Subsection 8772(c)(1) and leave the remainder of the statute intact. The doctrine of severability counsels that the Court should "maintain [an] act in so far as it is valid." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984). "Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability." *Id.* Here, there is no indication that Congress intended for the entire statute to fail should a single limiting provision be struck down. The "balance of the legislation is []capable of functioning independently." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). And Congress intended for Iran to be "held accountable," suggesting that Congress intended for this amendment to be available to any aggrieved plaintiffs. Severing Subsection 8772(c)(1) would not undo this goal. Accordingly, even if the

Court is inclined to reject Congress's ability to narrow its own laws to a single case, the decision below should be affirmed.

CONCLUSION

Amici herein believe that the Second Circuit's decision below was correct and provides the appropriate level of deference to actions taken by the Legislative Branch of which *amici* are members. Congress has the power to legislate in a manner that permits United States nationals to seek accountability from state sponsors of terrorism and to permit these same United States national victims to collect on judgments they properly obtain in federal court. Therefore, *amici* respectfully submit that the Court should affirm the Second Circuit's decision in favor of Respondents in this case.

Respectfully submitted,

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APPENDIX – LIST OF *AMICI*

The *amici curiae* joining this brief include:

US Senator Sheldon Whitehouse, Ranking Member, Senate Judiciary Subcommittee on Crime and Terrorism

US Senator Lindsey O. Graham, Chairman, Senate Judiciary Subcommittee on Crime and Terrorism

US Senator Ted Cruz, Chairman, Senate Judiciary Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts

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